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No Rain Coming in the Drought on Farmworker Labor Protections: *Cedar Point Nursery v. Hassid's* Destruction of Traditional Takings Law and Labor Protections for U.S. Farmworkers

Mercedes Guadalupe Molina[†]

Introduction

When I was younger, my mom would pack my siblings and I in the car and drive an hour outside of Dallas to a small, crooked home in Foreston, Texas where my great Aunt Eugenia—or “Auntie” as we called her—lived. Since most of my grandparents passed away before I was born, I looked to Auntie as a grandparent-figure. Our visits were spent helping Auntie cook too many tortillas and listening to stories about her and my grandparents’ childhoods. For hours I’d watch her hunch over the counter, her thick, scarred hands rolling out tortillas as she recounted the hard work she endured as a child farmworker. Though her knuckles and joints would swell, she kept working the dough, and told us how she began working in the fields when she was just five years old.

Auntie picked cotton, the primary crop in this part of Texas. She talked about how she was always behind in school and how at first, the thorns made the palms of her hands bleed, though over time, she developed thick callouses. “Thank the lord for those callouses,” she would say. Without fail she would stop to giggle at the memory of how fast she could pick and how, no matter how hard he tried, my grandfather could never keep up. She was always so proud of this feat.

Auntie’s stories were some of the first glimpses into the early lives of my grandparents and the world of the estimated 2.4 million farmworkers in the United States.¹ These workers are undoubtedly the backbone of the U.S. economy—keeping the general population fed—but

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1. *Who We Serve*, FARMWORKER JUST., <https://www.farmworkerjustice.org/about-farmworker-justice/who-we-serve/> [https://perma.cc/MW8Z-8AXV].

are subject to some of the most grueling work conditions for extremely low wages. In fact, farm work is one of the most dangerous industries in the United States.² Despite the hazards of this work, farmworkers are excluded from all federal worker protections, and state protections for these workers are far and few between.³

With the California Agricultural Labor Relations Act (ALRA), California is currently one of the only states that has farmworker-specific legislation to address farmworkers' exclusion from the National Labor Relations Act (NLRA).⁴ The ALRA has been in place for over fifty years as a result of the, at times violent, struggle of civil rights groups fighting for the human rights of farmworkers.⁵ However, the efficacy of these protections has been called into question following the Supreme Court's 2021 ruling in *Cedar Point Nursery v. Hassid*, when the Court found a clause of the ALRA that provided access to commercial growers' property for farmworker union organizers to be an unconstitutional taking under the Fifth Amendment.⁶

This Article argues the Supreme Court's decision in *Cedar Point* was wrongly decided by the Court and that the consequences of that decision will be disastrous for the rights of farmworkers. Part I gives background information on the ALRA, conditions of farmworkers, and the Takings Clause of the Fifth Amendment. It describes how the *Cedar Point* ruling departs from the Supreme Court's traditional framework of the Takings Clause. Section II.A discusses the inconsistencies of this ruling with previous rulings related to federal labor protections under the NLRA. This section also argues that the Court's precedent surrounding the NLRA supports upholding the ALRA's access clause. Section II.B then discusses

2. Farmworkers suffer the highest incidence of heat-related illness among all outdoor workers in any industry. SARAH BRONWEN HORTON, *THEY LEAVE THEIR KIDNEYS IN THE FIELDS: ILLNESS, INJURY, AND ILLEGALITY AMONG U.S. FARMWORKERS* 3 (Robert Borofsky ed., 2016). Farmworkers also suffer physical injuries and other illnesses related to the chronic stressors of farm work at high rates, such as chronic joint pain, back injuries, hypertension, cardiovascular disease, and more. *See id.* at 96–123. Additionally, farmworkers are subject to high rates of fumigation-related illness from crop pesticides. According to the Center for Disease Control (CDC), there have been 833 cases of acute pesticide poisoning across 12 states among agricultural workers recorded between 2007 and 2011. GEOFFREY M. CALVERT ET AL., NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CDC, *ACUTE OCCUPATIONAL PESTICIDE-RELATED ILLNESS AND INJURY—UNITED STATES, 2007–2011*, at 13 (2016). However, this is far from a complete picture. The agricultural industry is comprised of many individuals who are uninsured, immigrants, and non-English speaking, meaning many cases of illness likely go unreported. *See id.* at 13–14 (describing why data likely underestimates rates of acute occupational pesticide-related illness).

3. *See* discussion *infra* Section I.A.

4. *See* Philip L. Martin, *A Comparison of California's ALRA and the Federal NLRA*, 37 CAL. AGRIC. 6, 6 (1983) (discussing the differences between the ALRA and the NLRA); discussion *infra* Section I.A.

5. *See* discussion *infra* Section I.A.

6. *See* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

how the Court upholds the right to exclude in a way that not only values this right above all other property rights but also erodes decades of precedent. This treatment not only creates major issues for the field of property law, but it also has serious implications for the rights of workers. Finally, Section II.C discusses the effect of the *Cedar Point* ruling on the workplace and civil rights of farmworkers. This section argues that the ruling renders the few labor/civil rights protections in place for farmworkers nonexistent by eliminating the access clause. The Court's ruling in *Cedar Point* upholds the economic interests of wealthy and exploitative landowners and commercial farmers over the rights of one of the most vulnerable worker populations in our country. Without national efforts to support this population, the future for civil rights and farmworkers' rights is in grave danger due to this ruling.

I. Background

A. California Agricultural Labor Act and the Continued Fight for Farmworker Rights

The agricultural industry demands a large labor force to keep up with production of the very necessary food supply.⁷ Due to the lack of control over the market value, growers have long understood that one area where they can maximize profits is through decreasing the cost of labor.⁸ Efforts to decrease the cost of labor have meant more than just decreasing pay, however. As the population of the United States ballooned in the early 20th century and farmers began diversifying their crops, the agriculture industry shifted from small family farms relying on their own hands for labor to large commercial farms requiring more inexpensive labor.⁹

Two major pieces of federal legislation—the NLRA and the Fair Labor Standards Act (FLSA)—were passed during the 1930s New Deal Era in an effort to empower workers and create safer working conditions.¹⁰ Unfortunately, both pieces of legislation excluded farmworkers.¹¹ While the official reasoning for this exclusion notes a concern for the U.S. food supply chain¹² and a concern for a

7. See, e.g., ANN AURELIA LÓPEZ, *THE FARMWORKERS' JOURNEY* 96 (U. Cal. Press ed., 2007) (describing how California's agribusiness is "uniquely dependent" upon the labor of farmworkers); *Farm Labor*, USDA ECON. RSCH. SERV., <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#size> [<https://perma.cc/55TM-M4KX>] (describing the essential role of hired farmworkers).

8. LÓPEZ, *supra* note 7, at 96.

9. *Id.* at 94–96, 98–99.

10. *Id.* at 100–01.

11. *Id.*

12. Some members of Congress noted that the nature of agricultural work created

“disproportionate representation of rural people” in policy,¹³ it is widely understood that the decision was racially motivated.¹⁴ Historically, farmworkers were primarily Black Americans.¹⁵ Entering the second half of the 20th century, the farmworker population became increasingly foreign, represented by primarily Mexican and Filipino immigrants.¹⁶ Therefore, by excluding the agricultural sector from labor protections, the federal government permitted the exploitation of this large portion of workers—most of whom were immigrants and people of color. Exclusion meant these workers’ employment could be conditioned on long work hours, low pay, unsafe working conditions and more with little to no penalties to the employer.¹⁷ One New York politician warned that excluding farmworkers from the NLRA would guarantee “a continuance of virtual slavery until the day of revolt.”¹⁸ That revolt happened in 1965, when Delano grape farmworkers in the Coachella Valley of California organized an unprecedented agricultural labor strike.¹⁹

The Delano Grape Strike was one of the most prominent labor strikes in American history, involving over 7,000 California farmworkers.²⁰ Through the organizational efforts of the Agricultural Workers Organizing Committee (AWOC) and the National Farm Workers Association (NFWA)—two organizations that would later form the United Farm Workers (UFW)²¹—the strike produced a nationwide

concerns for disruptions of the food supply chain. Martin, *supra* note 4, at 6. If farmworkers made the decision to strike during harvesting season, they could jeopardize profits of growers for the entire year. *Id.* This unequal balance in bargaining power was seen as extremely unfair to the growers. *Id.*

13. Kamala Kelkar, *When Labor Laws Left Farm Workers Behind—And Vulnerable to Abuse*, PBS NEWSHOUR: NATION (Sept. 18, 2016), <https://www.pbs.org/newshour/nation/labor-laws-left-farm-workers-behind-vulnerable-abuse> [https://perma.cc/5N44-GZKE]. Leon Keyserling was the original drafter of the NLRA and served as a legislative aide for Senator Wagner, the Senator who carried the bill. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 121 (2011) (citing Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIA. L. REV. 285, 296–300 (1987)). In a later interview, Keyserling noted the exclusion of agricultural workers was politically necessary because including the high rural representation would make the bill unlikely to pass. *Id.* at 121–22 (citing Casebeer, *supra*, at 334).

14. Perea, *supra* note 13, at 121; see Kelkar, *supra* note 13.

15. See Perea, *supra* note 13, at 100–01.

16. See *id.* at 134; LÓPEZ, *supra* note 7, at 98; Kelkar, *supra* note 13.

17. See, e.g., Kelkar, *supra* note 13.

18. Perea, *supra* note 13, at 121 (quoting H.R. REP. NO. 74-969, at 28 (1935) (statement of Rep. Marcantonio)).

19. See LÓPEZ, *supra* note 7, at 103–05.

20. *Id.* at 104.

21. *A Latinx Resource Guide: Civil Rights Cases and Events in the United States – 1962: United Farm Workers Union*, LIBR. OF CONGR., [hereinafter *United Farm Workers Union*] <https://guides.loc.gov/latinx-civil-rights/united-farm-workers-union> [https://perma.cc

consumer boycott of table grapes, wine grapes, and lettuce.²² After almost five long years, the strike resulted in a successful wage increase and other benefits for the mostly Mexican and Filipino workforce.²³

Unfortunately, as Delano and subsequent strikes crippled the agriculture industry, strikers were often met with violence perpetrated by employers and law enforcement.²⁴ In an effort to quell the strikes and resulting violence, the California Legislature passed the California Agricultural Labor Relations Act of 1975 (ALRA), which gave California agricultural workers the right to self-organization and prevented employers from interfering with that right.²⁵

To achieve the ALRA's purpose of "ensur[ing] peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations,"²⁶ the California Legislature sought to ensure the protections could be utilized by farmworkers in practice, rather than just theory. To do so, the California Agricultural Labor Relations Board (ALRB)²⁷ promulgated an access provision that allowed a "right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support."²⁸ Under the ALRA, access by organizers requires prior written

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22. LÓPEZ, *supra* note 7, at 104 (citations omitted).

23. Robert A. Wright, *Farm Workers Union Signs First Table-Grape Contract with Two California Growers*, N.Y. TIMES (Apr. 2, 1970), <https://www.nytimes.com/1970/04/02/archives/farm-workers-union-signs-first-tablegrape-contract-with-two.html> [<https://perma.cc/2BQ5-LXJT>] (announcing the wage increases; contributions to health, welfare, and economic redevelopment funds; and prohibition of certain pesticides included in the agreement to end the strike).

24. See *El Malcriado Special Edition: Stories from the 1965 - 1970 Delano Grape Strike*, UNITED FARM WORKERS (Sept. 17, 2005), <https://ufw.org/research/history/el-malcriado-special-edition-stories-1965-1970-delano-grape-strike/> [<https://perma.cc/8RF4-QE7K>] ("Abuse, contempt and violence against strikers were commonplace."); cf. *United Farm Workers Union*, *supra* note 21 ("Subsequent boycotts and strikes against lettuce and strawberry growers occurred during the following years [after the Delano Grape strike]. Strikes often led to law enforcement intervention, where farmworkers were beaten, jailed, or replaced by non-citizen laborers.").

25. See Phillip Martin & Bert Mason, *California's ALRA and ALRB After 40 Years*, ARE UPDATE, Mar.-Apr. 2017, at 9, 9.

26. *Id.*

27. See *Fact Sheet - English*, AGRIC. LAB. RELS. BD. (2021), <https://www.alrb.ca.gov/forms-publications/fact-sheets/fact-sheet-english/> [<https://perma.cc/6K5J-7GT5>] ("The Agricultural Labor Relations Board (ALRB) is the state agency established to enforce the [ALRA]. The members of the Board are appointed by the Governor and confirmed by the California State Senate. The Board interprets and enforces the Act by deciding the rights of parties to labor disputes. The General Counsel, who is also appointed by the Governor, is independent of the Board and has exclusive authority to investigate unfair labor practice charges and to determine if a complaint should issue. If a complaint issues, the General Counsel's staff presents the case before an administrative law judge, whose decision may be appealed to the Board.").

28. CAL. CODE REGS. tit. 8, § 20900(e) (2021).

notice to the ALRB and service to the employer—at which time access can be disputed.²⁹ Further, access is limited to up to two organizers per thirty-person work crew;³⁰ up to four, thirty-day periods in one calendar year;³¹ and each access can last up to one hour during break times or outside of work hours.³² The access should be granted only during peak growing seasons.³³ While the rules are strict and the protections are limited, the ALRA is necessary to prevent further abuse of farmworker populations.

Today, farmworkers are some of the nation's most exploited workers. Farmworkers in the United States work extremely long hours of very intensive physical labor in the grueling elements. While at work, farmworkers frequently suffer physical injuries,³⁴ high incidences of heat stroke,³⁵ and chemical poisoning from pesticides sprayed on crops.³⁶ Farmworkers also suffer other illnesses at high rates caused by chronic stressors of their work, such as hypertension and cardiovascular disease.³⁷ Despite these known hazards, the industry fosters a profit-driven environment that does not place a priority on the safety of its workers and even discourages workers from speaking up when they are ill or injured.³⁸ This toxic atmosphere almost requires farmworkers to break down their bodies, only to barely scrape by financially. In 2019, the average annual salary for California farmworkers was \$27,550—a wage

29. *Id.* § 20900(e)(2) (“For the purpose of facilitating voluntary resolution by the parties of problems which may arise with access, the notice of intent to take access shall specify a person or persons who may reach agreements on behalf of the union with the employer concerning access to his/her property.”).

30. *Id.* § 20900(e)(4)(A).

31. *Id.* § 20900(e)(1)(A).

32. *Id.* §§ 20900(e)(3)(A)–(B).

33. *See* Martin & Mason, *supra* note 25, at 8 (describing how the ALRA only allows representation elections when “at least 50 percent of normal peak employees [are] at work and elections must be held within seven days after the . . . Board receives a valid petition from a union requesting an election.”). Due to the migratory nature of many farmworkers, this provision, in combination with access requirements, results in access being most effective during peak growing seasons to meet the requisite workforce number for an election.

34. *See* HORTON, *supra* note 2, at 98–111.

35. *See id.* at 17–45.

36. *See* CALVERT ET AL., *supra* note 2.

37. *See* HORTON, *supra* note 2, at 97–108.

38. Too often the farm work industry is focused on harvesting the maximum amount of crop in the least amount of time. *See, e.g.*, HORTON, *supra* note 2, at 24, 44–45. Employers prioritize efficient workdays over the need for breaks. *Id.* at 29, 44–45. This has caused many employers to forego warnings to acclimate workers to hotter temperatures, a crucial practice that can prevent heat-related illness and death. *Id.* at 33. Workers who are unable to keep up with this extreme pace due to injury or otherwise are frequently subject to lower wages (in the case of contract workers) or even loss of jobs. *Id.* at 24. Once a worker earns a reputation for being “lazy” or “weak” at one commercial farm, other employers are reluctant to give them another opportunity. *Id.* at 22, 27–28.

that puts all families on an extremely tight budget and most families below the federal poverty line.³⁹ Health insurance, of course, is often not included, and the bulk of farmworkers are uninsured.⁴⁰ All of these factors combined with the high incidence of migratory work due to different growing seasons, as well as the large incidence of non-English speaking and immigrant populations represented in farm work, illustrates the extremely vulnerable position farmworkers hold in our economy.

B. Takings Clause (Generally)

This Article focuses on the improper ruling of the Supreme Court in *Cedar Point Nursery v. Hassid*.⁴¹ However, to understand the ruling and the Court's failure in *Cedar Point*, it is necessary to have a general understanding of the Takings Clause. The Takings Clause is a constitutional protection under the Fifth Amendment which prohibits the federal government from seizing individual citizens' property without providing just compensation.⁴² Where there is a "straightforward condemnation action," like eminent domain, there is no question of whether or not a taking has occurred, and the government must provide just compensation under the Fifth Amendment.⁴³ However, issues arise where there is an implicit taking through some sort of government action that restricts or interferes with an individual citizen's use of their property.⁴⁴ Historically, the Supreme Court has recognized two categories of implicit takings: regulatory takings and per se takings.⁴⁵ This section will briefly describe these two categories to provide a basis for the discussion of the *Cedar Point* ruling in the next section.

The first category of takings, regulatory takings, occur when the government establishes laws or regulations that restrict the use or

39. Brief of Amici Curiae California Rural Legal Assistance, Inc., California Rural Legal Assistance Foundation, Farmworker Justice, and California Catholic Conference in Support of Respondents at 13, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107) [hereinafter Brief of California Rural Legal Assistance].

40. SARA ROSENBAUM & PETER SHIN, GEO. WASH. UNIV., KAISER COMM'N ON MEDICAID & THE UNINSURED, MIGRANT AND SEASONAL FARMWORKERS: HEALTH INSURANCE COVERAGE AND ACCESS TO CARE 1 <https://www.kff.org/wp-content/uploads/2013/01/migrant-and-seasonal-farmworkers-health-insurance-coverage-and-access-to-care-report.pdf> [<https://perma.cc/8FES-LX49>].

41. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

42. U.S. CONST. amend. V.

43. See JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY: CONCISE EDITION 627–28 (Wolters Kluwer Legal & Regul. U.S. ed., 2nd ed. 2017).

44. *Id.*

45. *Id.* at 125.

enjoyment of the property in some way.⁴⁶ This concept was established in *Pennsylvania Coal Co. v. Mahon*, when the Supreme Court found government regulations on a coal company's mining rights, which had been properly obtained, constituted an implicit taking.⁴⁷ The *Pennsylvania Coal* ruling invalidated the law at issue and allowed the company's mining to continue.⁴⁸ Unfortunately, the Court did not outline a clear standard for determining *when* a government regulation constitutes a taking, saying only that "if regulation goes too far it will be recognized as a taking."⁴⁹ The decision focused heavily on an evaluation of the "diminution in value" of the land caused by the regulation, but left many questions as for how to balance that loss in value of the property with the government's interest in regulation of the land for a specific purpose.⁵⁰ It was not until 1978, in *Penn Central Transportation Co. v. City of New York*, that the Court provided greater clarity on what constitutes an implicit taking by articulating a multifactor balancing test.⁵¹ In *Penn Central*, the Court balanced (1) the "economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action;" taking into account the Taking Clause's purpose of fairness and justice in compensation for the burden of governmental action.⁵² This balancing must consider whether the regulation prevents a harm to the general public and whether the regulation secures an "average reciprocity of advantage,"⁵³ or fair burden on the individuals given the larger benefits resulting from the regulation.⁵⁴ Since *Penn Central*, the Court has ascribed to the multifactor balancing test in its

46. *Id.* at 635.

47. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

48. *See id.* at 413-14.

49. *Id.* at 415.

50. *See id.* at 413-14, 419.

51. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

52. *Id.* at 124.

53. *Pa. Coal Co.*, 260 U.S. at 422. While the majority in *Penn Central* did not use the explicit language "average reciprocity of advantage," it essentially described this factor as part of its examination into how "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central*, 438 U.S. at 127-28.

54. *See id.* at 123-28. It should also be noted that "average reciprocity of advantage" is an extremely vague legal term that has been debated by legal scholars since its use in *Pennsylvania Coal Co.* without a clear definition. *See William W. Wade & Robert L. Bunting, Average Reciprocity of Advantage: "Magic Words" or Economic Reality—Lessons from Palazzolo*, 39 URB. L. 319 (2007). For the purposes of this Article, this term will be understood as a "validator of police power impairment of private property rights to improve public welfare." Thomas A. Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from Mugler to Keystone Bituminous Coal*, 14 B.C. ENV'T AFFS. L. REV. 653, 672 (1987).

analyses of regulations when considering whether they constitute an implicit taking under the Fifth Amendment.⁵⁵

The second category of implicit takings established by the Court—per se takings—occur when there is a categorical rule that the specific type of use by government constitutes a taking.⁵⁶ Since per se takings are categorical rules—defined by the Supreme Court—they are not subject to the default *Penn Central* balancing test.⁵⁷ The Supreme Court has been careful in its identification of these categorical rules, setting them sparingly and under strict circumstances.⁵⁸ The Court's established categorical rules deal with permanence, physicality, and *complete* diminution of economic value, and can be separated into two distinct categories: (1) when “the government directly appropriates private property for its own use”⁵⁹ and (2) when the government “causes a permanent physical occupation of property.”⁶⁰

As to the latter “permanent physical occupation” category, the Court found in *Loretto v. Teleprompter Manhattan CATV Corp.* that a city ordinance requiring apartments to allow for the installation of permanent cable boxes on their rooftops constituted a per se taking.⁶¹ The ruling hinged on both the permanence and physicality of the cable box occupation.⁶² The *Loretto* Court described its holding as “very narrow,”⁶³ and the Court has indeed subsequently interpreted this “permanent physical occupation” category of takings narrowly.⁶⁴

55. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528–29 (2005) (“[R]egulatory takings challenges are governed by *Penn Central*... *Penn Central* identified several factors—including the regulation’s economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action—that are particularly significant in determining whether a regulation effects a taking.” (internal citation omitted)).

56. *DUKEMINIER*, *supra* note 43, at 659.

57. *Id.* at 653, 659.

58. Legal scholars have pointed out the relatively new innovation of per se takings, finding that their identification is extremely unclear and is not supported by historical government actions. John D. Echeverria, *What Is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 731 (2020) (discussing the inconsistencies in per se takings law and advocating for a more simplified approach which ignores the economic impact on the landowner and looks only at whether exploitation or invasion of privacy has occurred).

59. *Horne v. Dep’t of Agric.*, 576 U.S. 350, 357 (2015) (quotation omitted).

60. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982)).

61. *Loretto*, 458 U.S. at 421.

62. *Id.* at 426–42.

63. *Id.* at 441.

64. See *Yee v. City of Escondido*, 503 U.S. 519, 531–32 (1992) (holding a rent control ordinance that applied to owners of a mobile home park was not a “permanent physical occupation” and did not constitute a taking); see also *FCC v. Fla. Power Corp.*, 480 U.S. 245 (1987) (finding *Loretto* did not apply to challenge against the rate at which utility could charge cable television companies using its poles set by the FCC).

Later, in *Lucas v. South Carolina Coastal Council*, the Court found that a local ordinance which prevented a landowner from building any new permanent structures on his land was a taking because it “prohibit[ed] all economically beneficial use of [the] land.”⁶⁵ While the ordinance in *Lucas* was aimed at protecting the area from erosion caused by the shoreline,⁶⁶ it meant that the owners of the shoreline property could not use the property for personal or commercial development or operations as the ordinance prohibited the owners from building new structures. In being unable to develop the land, the owners were essentially left with a vacant plot in an extremely profitable commercial area. Because the regulation left landowners with an extremely limited use of the land, the Court found this to be a taking.⁶⁷ In its opinion, however, an exception was carved out to allow for restrictions that came from “background principles” of a state’s nuisance law.⁶⁸ The aforementioned cases set the traditional framework for how takings are understood in property law.

C. *How Cedar Point Changed the Traditional Takings Framework*

In June of 2021, the Supreme Court issued a ruling in *Cedar Point Nursery v. Hassid*⁶⁹ that completely tore apart the previously understood takings framework. The case dealt with an access clause in the ALRA.⁷⁰ The access clause in question recognized the difficulty labor organizers faced in reaching farmworkers—many of whom are migrant workers, non-English speaking, and immigrants—and legally provided extremely limited access to these workers while at their work place.⁷¹ The access clause was challenged by commercial growers—Cedar Point Nursery and Fowler Packing Company—after UFW members utilized the access clause to lawfully enter the growers’ property under the ALRA.⁷²

65. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

66. *Id.* at 1037.

67. *Id.* at 1027–31.

68. *DUKEMINIER*, *supra* note 43, at 674.

69. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

70. *See supra* notes 25–32 and accompanying text for a description of the ALRA’s access clause.

71. *See supra* notes 25–32 and accompanying text.

72. The complaint alleges that UFW organizers entered Petitioners’ property outside of the parameters of the access clause by not giving notice. *Cedar Point*, 141 S. Ct. at 2069–70. While the details of this allegation are inconsequential to the decision, it should be noted that, in its amicus brief, UFW disputes these allegations saying they acted within the access clause by giving sufficient prior notice to the Petitioners before entering their property. Brief for United Farm Workers of America as Amicus Curiae in Support of Respondents at 15–16, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107) [hereinafter Amicus Brief for United Farm Workers]. UFW further contends that their organizers were prevented from entering the premises in violation of the access clause of the ALRA. *Id.*

The growers argued that the access clause of the ALRA itself was unconstitutional under the Fifth Amendment, as it created a per se taking “by appropriating without compensation an easement for union organizers to enter their property.”⁷³ This is completely inconsistent with the previous framework of the Takings Clause. In fact, that is exactly what the District Court said when it denied the growers’ motion for a preliminary injunction and dismissed the complaint, saying the access clause did not allow public access in a way that was continuous and permanent, so it could not be a per se taking.⁷⁴ This ruling was affirmed by both the Court of Appeals⁷⁵ and the Ninth Circuit.⁷⁶

In June 2021, despite the growers’ obvious inconsistencies with the established takings framework, the Supreme Court held that the access clause of the ALRA constituted a per se taking.⁷⁷ Instead of defaulting to the multifactor balancing test established in *Penn Central*, the Court treated the access clause as a categorical rule, or per se taking, thereby upholding the right to exclude third parties from one’s land.⁷⁸

The Court had never before upheld the right to exclude as a categorical rule. In fact, the Court had repeatedly held the opposite, finding that certain needs outweigh a property owner’s right to exclude.⁷⁹ The Court has consistently found that commercial firms cannot assert a right to exclude if that access is related to the commercial regulation of the firm.⁸⁰ This concept has been the basis for upholding all access provisions which give weight to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Occupational Safety & Health Act, United States Department of Agriculture, Food and Drug Administration, and many more regulatory agencies.⁸¹ In the absence of all other labor

73. *Cedar Point*, 141 S. Ct. at 2070.

74. *Cedar Point Nursery v. Gould*, No. 1:16-cv-00185-LJO-BAM, 2016 U.S. Dist. LEXIS 51819, at *15–17 (E.D. Cal. Apr. 18, 2016).

75. The Court of Appeals was a divided panel but ultimately affirmed. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (2019).

76. The Ninth Circuit affirmed and denied rehearing en banc. *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162 (2020).

77. *Cedar Point*, 141 S. Ct. at 2072.

78. *Id.*

79. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (finding that Title II, pertaining to racial discrimination in public accommodations affecting commerce, does not rise to the level of a taking in violation of the Fifth Amendment); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (finding that an exercise of the right of free expression and petition does not constitute a taking in violation of the Fifth Amendment, as it does not “unreasonably impair” the value of property and, therefore, is not outweighed by a landowner’s right to exclude).

80. See Brief of Amici Curiae National Employment Law Project et al. in Support of Respondents at 4–7, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107).

81. See discussion *infra* Section II.B; see also 42 U.S.C. § 12182(b) (prohibiting discrimination on the basis of disability in places of public accommodation, including

protections, the entrance of union organizers is therefore vital to the accountability of these large commercial growers.⁸² Even though the opinion seemingly carves out an exception for government agencies—something that seems far from a guarantee given the twisted legal reasoning of *Cedar Point*, and the now extremely precarious nature of the takings doctrine—it is still inconsistent with precedent that has established that “neither property rights nor contract rights are absolute Equally fundamental with the private right is that of the public to regulate it in the common interest.”⁸³

In its opinion, the Court unequivocally agreed with the growers’ argument that the access provision created an easement, and therefore a *per se* taking.⁸⁴ However, in its determination of whether the right of access was an easement, the Court gave little weight to the nature of those holding the right of access—that is, whether the access right is attached to a neighboring piece of land or whether the access right is held by a person or group of people.⁸⁵ Historically, the Court has placed considerable weight on the nature of those holding the right of access when making takings determinations,⁸⁶ but this Court’s analysis ignored this distinction entirely. As with other logic of the *Cedar Point* opinion, this omission is extremely inconsistent with property law principles and Supreme Court precedent.⁸⁷

II. Analysis

This analysis outlines the ways the *Cedar Point* ruling is detrimental to the rights of farmworkers and how the ruling is inconsistent with

private property such as businesses that are generally open to the public, under the Americans with Disabilities Act); 29 U.S.C. § 657(a) (authorizing Occupations Safety and Health Association inspections of workplaces to ensure compliance with the Occupational Safety and Health Act standards); 21 C.F.R. § 58.15(A) (authorizing employees of the Food and Drug Administration “to inspect the facility”); 21 C.F.R. § 812.145(a) (authorizing the Food and Drug Administration access “to enter and inspect any establishment where devices are held (including any establishment where devices are manufactured, processed, packed, installed, used, or implanted or where records of results from use of devices are kept)”).

82. See discussion *infra* Section II.C.

83. *Nebbia v. New York*, 291 U.S. 502, 510 (1934).

84. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2068 (2021).

85. *Id.*; *DUKEMINIER*, *supra* note 43, at 485–86 (“[E]asements give easement owners the right to make some specific use . . . of land that they do not own. An easement appurtenant gives that right to whomever owns a parcel of land that the easement benefits Easements appurtenant require both a *dominant tenement* (or estate) and a *servient tenement*.”).

86. See *DUKEMINIER*, *supra* note 43, at 485–86 (explaining how courts consider who is benefiting from the use of an easement when deliberating the type of easement or how to allocate property use generally with easements).

87. See *infra* Section II.B.

property law and labor law precedent. In Section A, this Article outlines previous cases surrounding the NLRA and points to how this precedent strongly supports the ALRA's access provision. Specifically, this section breaks down the "necessity" showing required by the NLRA and identifies how the ALRA follows these same principles through its access provision even without an explicit necessity requirement. Section B discusses the inconsistencies of *Cedar Point* with property law precedent which is careful to assign government actions as per se takings and which does not support the Court's upholding of the "right to exclude" above other property law principles. This section argues that, based on leading takings case law, the *Cedar Point* Court should have utilized the multifactor balancing test in its analysis of the ALRA's access provision. Finally, Section C identifies the impact this ruling will have, and is likely already having, on the very limited protections for farmworkers in California. The section briefly outlines the bleak future of civil rights and labor rights for this population due to the inaction of federal and state governments. This Article concludes that this ruling plainly is bad for civil rights, workplace rights, the regulatory state, and, of course, farmworkers.

A. *Cedar Point Is Not in Line with Protections Afforded to Workers Covered Under the NLRA*

Like the ALRA, the NLRA provides for nonemployee union organizer access.⁸⁸ The Court has recognized this right to access in all takings case law where the issue has been presented, saying access that is "necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]"⁸⁹ and access that is limited to "the duration of the organiz[ing] activity" should be permitted.⁹⁰ Because the ALRA was meant to correct the exclusion of farmworkers from the NLRA, the ALRA drafters largely attempted to mirror NLRA protections; the only significant differences in the ALRA reflect the seasonal nature of agriculture work.⁹¹ For example, because approximately 19% of farmworkers are foreign migrant workers, gaining access to them is more

88. See National Labor Relations Act, 29 U.S.C. § 152.

89. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 n.11 (1982) (alteration in original) (quotation omitted) (distinguishing labor cases which allow for access to private property by union organizers from what constitutes as a permanent physical occupation).

90. *Id.* (quotation omitted).

91. Brief of the American Federation of Labor & Congress of Industrial Organizations as Amicus Curiae in Support of the Emps. at 8-9, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107) [hereinafter Amicus Brief of the American Federation of Labor] (first citing *Loretto*, 458 U.S. at 434-35; and then quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972)).

difficult for labor organizers than in many other industries where workers have some sort of home base.⁹² Even more, issues of language barriers, literacy skills, uncertain work hours, and employer-regulated housing and transportation create greater obstacles to organization than in most other industries.⁹³ The California Legislature understood that, due to the aforementioned obstacles, access by nonemployee organizers is in fact necessary to fully realize the right to self-organization.⁹⁴ Accordingly, the legislature did not require a showing of necessity,⁹⁵ but it did limit the access right more strictly than the NLRA.⁹⁶ As a practical matter, therefore, the encroachment on farmers' property rights created by the access clause is arguably less than the intrusions sanctioned by the NLRA in other workspaces. The following paragraphs highlight the extremely limited components of the ALRA's access provision.

The ALRA imposes restrictions that only allow for labor organizers to enter an employer's workplace for the purpose of organizing.⁹⁷ That access is also limited to breaks and time outside of work hours, such as before or after work;⁹⁸ these restrictions alone are enough to dissuade

92. Amicus Brief for United Farm Workers, *supra* note 72, at 3.

93. These barriers to organization are especially true for H-2A visa farmworkers and undocumented farmworkers. Undocumented, recently documented, and guestworker farmworkers are often weary of raising any kind of issues in the workplace due to a fear of retaliation by their employer. See Alexis Guild & Iris Figueroa, *The Neighbors Who Feed Us: Farmworkers and Government Policy—Challenges and Solutions*, 13 HARV. L. & POL'Y REV. 157, 158–59 (2018). This fear means these workers will often withstand horrendous conditions, such as working while injured, working through unsafe temperatures, working among pesticides, or working without water or restroom breaks. *Id.* Because H-2A visa workers and guestworkers are living in the United States with a temporary visa, they are often in a situation where employers control almost all aspects of their lives, including housing and transportation. *Id.* It is not uncommon for employers to abuse this type of power. When these workers speak up against their employers, they run the risk of retaliation in housing and transportation, threats to their job, and even deportation. This type of reluctance to report has been noted as a significant barrier by labor organizing groups. See Margaret Gray & Shareen Hertel, *Immigrant Farmworker Advocacy: The Dynamics of Organizing*, 41 POL'Y 409, 426 (2009) (“The system of undocumented workers makes them so vulnerable that it would be really hard for them to believe that they could get something from being organized and being part of [a grassroots organization representing farmworkers’ interests].”).

94. Guild & Figueroa, *supra* note 93, at 172–73.

95. The NLRA requires a showing of necessity for nonemployee union organizers to gain access to an employer's property. See *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978). The necessity requirement is a way the Court has protected the landowners' right to exclude in light of regulations which require employers to allow entrance of the nonemployee union organizers to the employer's property. See *id.* Specifically, the necessity requirement states that, “[t]o gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation.” *Id.* The ALRA does not have this same requirement. CAL. CODE REGS. tit. 8, § 20900(e).

96. Amicus Brief of the American Federation of Labor, *supra* note 91, at 2.

97. CAL. CODE REGS. tit. 8, § 20900(e).

98. *Id.* §§ 20900(e)(3)(A)–(B).

organizing, as farmworkers tend to work long twelve-hour shifts,⁹⁹ sometimes beginning in the dead of night.¹⁰⁰ Additionally, the access is further limited to up to three hours a day, in one-hour time periods, for only four thirty-day periods out of the calendar year.¹⁰¹ Because the purpose of entrance is most often to select a collective bargaining representative through employee signatures, the access is limited *further* to peak growing seasons.¹⁰² This seasonal limitation is because the ALRA requires signatures from a majority (more than 50%) of workers to file an election petition for a collective bargaining representative and peak growing season is the only time a majority population is present on a farm.¹⁰³ The NLRA, on the other hand, only requires signatures from 30% of the employees to file an election petition.¹⁰⁴ Not only are these restrictions more stringent than the NLRA's access allowance, but they make it nearly impracticable to exercise the access clause.

Due to the seasonal nature of work, it is difficult for union organizers to meet this majority requirement to file a petition for election. Many farmworkers stay at one work site for only weeks at a time.¹⁰⁵ This frequent movement combined with the high rate of farmworkers employed by a third-party contractor cause additional issues to the organizers' ability to meet the election petition signature requirement.¹⁰⁶ Finally, issues of literacy, language, and access to technology prevent organizers from meeting this requirement via other means, such as mail or digital communication.¹⁰⁷ As a practical matter, therefore, nonemployee union organizers exercise their access rights under the ALRA in very limited ways.¹⁰⁸

It must be understood that this process is *the only permissible way* farmworkers are able to form a bargaining relationship with their

99. Auntie frequently recounted how she would work from sun-up to sun-down.

100. See *Night Work: A Growing Trend in Western Agriculture?*, UC DAVIS W. CTR. FOR AGRIC. HEALTH & SAFETY (Mar. 7, 2019), <https://aghealth.ucdavis.edu/news/night-work-growing-trend-western-agriculture> [<https://perma.cc/253B-T9Z8>].

101. CAL. CODE REGS. tit. 8, §§ 20900(e)(3)(A)-(B).

102. See Amicus Brief of the American Federation of Labor, *supra* note 91, at 9-10 (citing Henry Moreno, 3 ALRB No. 40, at 5 (1977)).

103. *Id.*

104. National Labor Relations Act, 29 U.S.C. §§ 159(c), (e).

105. Amicus Brief of the American Federation of Labor, *supra* note 91, at 4.

106. Since 2007, the agricultural industry has seen a sharp increase in the hiring of farmworkers through third-party labor contractors. Amicus Brief of California Rural Legal Assistance, *supra* note 106, at 16. In some counties, the number of farmworkers who are hired by a third-party contractor is 50% or more. *Id.*

107. *Id.* at 10.

108. Due to the listed obstacles and limitations of the ALRA's access clause, most union organizers are only able to utilize their access rights once a year. Amicus Brief of the American Federation of Labor, *supra* note 91, at 22.

employers.¹⁰⁹ Without the access clause, the ALRA holds no teeth. Again, the Court has recognized the significance of access to the workplace for nonemployee union organizers in *NLRB v. Babcock & Wilcox Co.*, finding that “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.”¹¹⁰ Access to workers is necessary because “[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.”¹¹¹ The reality is that workers are unlikely to learn about work-related things, such as workplace rights, outside of work. Additionally, as is the case for farmworkers, there are significant barriers to contacting workers outside of the workplace to inform them of their workplace rights.¹¹²

However, even where a showing of necessity is required—as is the case for the NLRA—the Court has found that necessity is met in circumstances where workers are hard to reach.¹¹³ A showing of necessity for nonemployee organizers to gain access to a workspace was first established in *Babcock*, where the Court explained its understanding that self-organization in a workplace does not come with the same interference as organizing by nonemployees.¹¹⁴ While *Babcock* did not explicitly limit Section Seven of the NLRA to showings of necessity, the Court did so later in *Central Hardware Co. v. NLRB*¹¹⁵ and *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*.¹¹⁶

With these same principles in mind, the Court directly addressed the necessity requirement in *Lechmere, Inc. v. NLRB* and established examples where that requirement would be automatically met.¹¹⁷ While *Lechmere* respected the narrow tailoring of *Babcock’s* interpretation of Section Seven of the NLRA, the Court pointed out that *Babcock* did not

109. See CAL. LAB. CODE § 1159 (2022) (“[O]nly labor organizations certified pursuant to this part shall be parties to a legally valid collective-bargaining agreement.”).

110. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

111. *Id.* at 113.

112. See, e.g., *supra* notes 92–93 and accompanying text.

113. See *Babcock*, 351 U.S. at 113 (“[I]f 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, the employer must allow the union to approach his employees on his property.”); Amicus Brief of the American Federation of Labor, *supra* note 91, at 15–16 (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992)).

114. See *Babcock*, 351 U.S. at 113.

115. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 544–45 (1972) (“[T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employee’s [§] 7 rights.”).

116. *Sears, Roebuck & Co. v. San Diego Cnty. Dist. of Carpenters*, 436 U.S. 180, 205 (1978) (“To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer’s access rules discriminate against union solicitation.”).

117. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533–35, 539–40 (1992).

completely close the door to these workers, but instead identified an exception in per se cases of necessity.¹¹⁸ Specifically, the Court identified instances where the location of a workplace and living place of employees was “*beyond the reach* of reasonable union efforts to communicate with them.”¹¹⁹ The whole point of this exception was to protect the rights of workers who were isolated due to their employment. That isolation was enough to meet the necessity requirement of the NLRA’s access provision. In its own analysis, the *Lechmere* Court pointed to workers at logging camps, mining camps, and mountain resort hotels, whom it found were in sufficiently difficult-to-reach circumstances that made access for nonemployee organizers necessary.¹²⁰ Given the *Babcock*, *Central Hardware*, *Sears*, and *Lechmere* analyses, farmworkers sufficiently meet this necessity threshold.

This point of precedent—recognizing that difficulty of access justifies access rights—was made by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in its amicus brief, but the point remained unaddressed by the majority opinion in *Cedar Point*.¹²¹ In addition to the demographics of workers that make organizing difficult,¹²² the reality is that farmworkers are also often difficult to reach by purely geographic measures. Farmworkers work in remote areas.¹²³ Often, farmworkers live on property owned by their employer or in hotels or apartments provided by their employers.¹²⁴ These work and living arrangements are comparable to those of loggers, miners, and mountain resort hotel employees for whom the Court has recognized access regulations as necessary.¹²⁵ This living situation is exactly the kind of necessity identified by the *Lechmere* Court and recognized by the California Legislature in its drafting of the ALRA. By ignoring these facts, the majority in *Cedar Point* has disregarded labor law precedent in a way that has seriously diminished the limited rights afforded to California farmworkers.

118. *See id.* at 533–34.

119. *Id.* at 539 (citing *Babcock*, 351 U.S. at 113).

120. *Id.* at 539–40 (internal citations omitted).

121. *See* Amicus Brief of the American Federation of Labor, *supra* note 91, at 14–15 (citing *Lechmere*, 502 U.S. at 539 (1992)).

122. *See supra* note 93 and accompanying text.

123. *Housing*, NAT’L FARM WORKER MINISTRY, <https://nfwm.org/farm-workers/farm-worker-issues/housing/> [<https://perma.cc/D3WD-S5HL>].

124. *Id.*

125. *See Lechmere*, 52 U.S. at 539–40 (1992) (listing these occupations as examples where employees were outside the reach of reasonable union attempts to communicate with employees).

B. Cedar Point Prioritizes the Right to Exclude to the Detriment of Actual Property Law

The *Cedar Point* majority focuses on the right to exclude to the detriment of the traditional regulatory Takings Clause framework. As previously noted, *Penn Central* established a multifactor balancing test that has been utilized by the Court in making determinations of takings that are not outright.¹²⁶ These factors include: (1) the “economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the governmental action;” taking into account the Taking Clause’s purpose of fairness and justice in compensation for the burden of governmental action.¹²⁷ The majority in *Cedar Point* argues, however, that *Penn Central*’s factors do not apply.¹²⁸ The Court instead held that the noncontinuous presence of labor organizers on a grower’s property is a per se taking due to its interference with the owner’s right to exclude.¹²⁹ This twisting of precedent gaslights legal scholars by arguing that the traditional takings framework does not distinguish between intermittent and continuous use.¹³⁰ To support their less-than-intellectually-honest framework, the majority incorrectly interprets rulings like *Loretto*,¹³¹ *Nollan v. California Coastal Commission*,¹³² and *PruneYard Shopping Center v. Robbins*¹³³—all of which actually

126. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–28 (1978); *see also* discussion *supra* Section I.B.

127. *Penn Central*, 438 U.S. at 124.

128. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074–77 (2021).

129. *Id.*

130. *Id.* at 2074.

131. *E.g., id.* (internal citations omitted) (“To begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary. Our cases establish that ‘compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary.’ The duration of an appropriation—just like the size of an appropriation, *see Loretto*, 458 U.S. at 436–437, 102 S.Ct. 3164—bears only on the amount of compensation.”). *But see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982) (“The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking . . . [S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.”).

132. *See Cedar Point*, 141 S. Ct. at 2075 (“[W]hile *Nollan* happened to involve a legally continuous right of access, we have no doubt that the Court would have reached the same conclusion if the easement demanded by the Commission had lasted for only 364 days per year.”). *But see Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 832 (1987) (“We think a ‘permanent physical occupation’ has occurred, for purposes of that rule, 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.”).

133. *E.g., Cedar Point*, 141 S. Ct. at 2076 (“The Board and the dissent argue

emphasized the importance of permanency and continuance in identifying *per se* takings.

The majority's application of takings precedent is baseless. Even in *Penn Central*, the Court found that New York's Landmarks Law, which imposed an architectural limit on Penn Central's ability to build on their property in a certain way, did not amount to a taking just because the property owner was unable to exploit *one stick*¹³⁴ in the bundle of property rights due to the regulation.¹³⁵ In fact, the *Penn Central* Court found such logic to be "quite simply untenable."¹³⁶ In the case of *Cedar Point*, this *one stick* is represented by the right to exclude. Based on *Penn Central*—the seminal case of takings law—the right to exclude *alone* should not be sufficient to constitute a taking. The Court should have looked to the *Penn Central* factors for its analysis.

The majority refuses to apply *Penn Central*, however.¹³⁷ Further, it does little in the way of distinguishing how this one property right at issue, the right to exclude, rises to the level of a *per se* taking, whereas the one property right at issue in *Penn Central* does not. After all, both cases dealt with *only one stick* in the bundle of rights. The *Cedar Point* Court itself is unable to identify any actual distinctions between the importance of the two sticks at issue in the cases, offering only a refrain that the right to exclude is a "fundamental element of the property right[s]" as its explanation for this ruling.¹³⁸

Recognizing that repetition is not the most convincing tool for this inaccurate reading of takings law, the majority utilizes a dictionary to offer the slightest support to its twisted analysis. Relying on the most literal meaning of the word "appropriation," the majority says the access clause's phrasing "to *take* access" constitutes appropriation, and

that *PruneYard* shows that limited rights of access to private property should be evaluated as regulatory rather than *per se* takings. We disagree." (internal citation omitted)). *But see* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83–84 (1980) ("Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause . . . Appellees were orderly, and they limited their activity to the common areas of the shopping center. In these circumstances, the fact that they may have 'physically invaded' appellants' property cannot be viewed as determinative.").

134. In relation to property law, the term "bundle of sticks" is a metaphor used to understand the basic aspects of property ownership. Audrey McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 874–75 (2011).

135. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978).

136. *Id.*

137. *Cedar Point*, 141 S. Ct. at 2072.

138. The Court used this phrasing multiple times. *See id.* at 2072, 2077 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979)).

therefore is a taking.¹³⁹ This surface level analysis side-steps the dissent's inquiry into the true meaning of the word "appropriate," where Justice Breyer notes the access clause in fact does not "take from the owners a right to invade . . . [or] give the union organizations the right to exclude anyone."¹⁴⁰ So what is *actually* being appropriated from the Petitioners, according to the majority?

As admitted by the Chief Justice in the majority opinion, takings (both regulatory and *per se*) have most often dealt with a specific property interest being physically taken by the government via "a servitude or an easement."¹⁴¹ The Petitioners themselves claim there is an easement at issue throughout their petition for certiorari, falsely characterizing the access right as an easement.¹⁴² But the access right is not an easement at all. An easement must be explicitly granted, but there is nothing in the ALRA that identifies the access right as an easement and no mention of the type of activity allowed by the ALRA's access right in California's statutes surrounding easements.¹⁴³ Further, when looking to the State of California's definition of an easement in gross, there are inconsistencies with transfer and burden requirements that cannot be overlooked.¹⁴⁴

The majority itself recognizes this lack of support for the Petitioners' assertion that there is an easement, noting both the omission in California's property law and the state's authority in defining property principles as the "creatures of state law."¹⁴⁵ However, they disregard the state definition of an easement and subtly waive the traditional requirements of an easement, calling the instant case "a slight mismatch from state easement law."¹⁴⁶ The majority even goes as far as waiving the traditional view that something as substantial as an easement or servitude is necessary to trigger the Takings Clause.¹⁴⁷ Instead, the majority argues that any type of incursion on someone else's land—without distinction for how substantial the intrusion, the length of time it lasts, or who commits the intrusion—should be considered a *per se*

139. *Id.* at 2077.

140. *Id.* at 2083 (Breyer, J., dissenting).

141. *Id.* at 2073.

142. See Petition for Writ of Certiorari at *3, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (No. 20-107).

143. See CAL. CIV. CODE § 801 (West 2023).

144. The Court states that the ALRB called out these inconsistencies, noting that California law requires transferability and a burden to a particular parcel of property. *Cedar Point*, 141 S. Ct. at 2075. The access provision, however, "may not be transferred, [and] does not burden any particular parcel of property." *Id.*

145. *Id.* at 2075–76.

146. *Id.* at 2076.

147. *Id.*

taking.¹⁴⁸ Not only does this flippant disregard for the details basically eliminate an entire category of takings—regulatory takings—but, when viewed alongside takings precedent and the Petitioners’ arguments, it creates confusion surrounding the role easements and servitudes play in takings determinations, if one at all.

The Supreme Court’s careless explanation, or lack thereof, as to whether the access right conveys an easement paves the way for a finding that easements can run appurtenant to non-tangible, non-property, such as an employment relationship. In its amicus brief to the Court, UFW expressed this concern, arguing “the Access Regulation does not grant an easement because it allows access to the workers—not to particular property An easement must be appurtenant to land, not to workers.”¹⁴⁹ This point is also made by the AFL-CIO in their amicus brief, stating that “[t]he 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.”¹⁵⁰ Allowing an easement to run appurtenant to an employment relationship presents serious questions of the rights of workers in relation to an owner’s property—all under the guise of protecting property rights.

Even disregarding this theory that the Court’s analysis allows for an easement to an employee, the majority’s opinion has similar results under the per se framework, as per se takings case law often relies heavily on economic value deprivation.¹⁵¹ While the Petitioners did not necessarily make a claim of *complete deprivation*, precedent combined with the majority’s casual reference to the importance of the economic interests of property owners¹⁵² again seem to assert that a property owner has some sort of property interest in the labor on their land. Under this logic, allowing union organizers to speak with laborers means landowners are losing time when these workers could be working. It follows, then, that through the lens of a traditional per se understanding, the access clause results in economic deprivation or diminution of economic value of the land. Accounting for this economic loss seemingly creates a property interest of the growers in the farmworkers themselves. While the majority is careful to not over-apply the economic deprivation

148. *Id.*

149. Amicus Brief for United Farm Workers, *supra* note 72, at 19.

150. Amicus Brief of the American Federation of Labor, *supra* note 91, at 19 (emphasis added).

151. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1077 (1992) (Souter, J., statement) (explaining that a per se taking can be found where there is a “complete deprivation” of economic value of the property interest at issue); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (explaining that a per se taking can be found where a government action “empt[ies] the [property] right of any value”).

152. *Cedar Point*, 141 S. Ct. at 2073–74.

principle—probably because this logic alludes too much to modern-day slavery—this reading does follow from per se takings precedent and the Court’s analysis. In ruling for the Petitioners, the majority plants the seeds for reliance on similar future readings, which will have disastrous effects for the rights of workers everywhere and leaves a stench in the practice of property law.

C. *Cedar Point Is Detrimental to the Civil Rights of Farmworkers, Many of Whom Are Immigrants of Color*

It cannot be overstated how few protections farmworkers are afforded both at the federal and state levels. Farmworkers are not subject to the NLRA or most provisions of the FLSA.¹⁵³ That means they are exempt from federal protections of unionization, minimum wage, overtime pay, work day and hour restrictions, and even most child labor protections.¹⁵⁴ Farmworkers often do not receive workers’ compensation, health insurance, or disability insurance.¹⁵⁵ In fact, California’s ALRA is one of the only labor protection laws of its kind for farmworkers in the United States and, even then, it is less regulatory in nature than federal protections, as it provides protections only for the unionization rights of farmworkers. Still, its protections are not even afforded to all of California’s farmworkers.¹⁵⁶ Farmworkers who work as contractors—a growing trend in the agricultural industry—do not qualify for ALRA protections.¹⁵⁷

Now, with the elimination of the crucial access provision to the ALRA, farmworkers have been thrust back into the dark days of the industry, destroying many of the gains of farmworkers’ rights movements.¹⁵⁸ Organizing workers for the purposes of collective bargaining will be nearly impossible considering the aforementioned obstacles—the migratory patterns of work, the long and unpredictable

153. See *U.S. Labor Law for Farm Workers*, NAT’L FARM WORKER MINISTRY (Aug. 2018) <https://nfwm.org/farm-workers/farm-worker-issues/labor-laws/> [<https://perma.cc/C5NP-7Q7H>].

154. *Id.*; *U.S. Labor Law for Farmworkers*, FARMWORKER JUST., https://www.farmworkerjustice.org/advocacy_program/us-labor-law-for-farmworkers/ [<https://perma.cc/64KN-3B2P>].

155. AM. PUB. HEALTH ASSOC., *IMPROVING WORKING CONDITIONS FOR U.S. FARMWORKERS AND FOOD PRODUCTION WORKERS* (2017), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/improving-working-conditions> [<https://perma.cc/8QJ3-QV64>].

156. Amicus Brief of California Rural Legal Assistance, *supra* note 106, at 16–17.

157. *Id.* at 17. There has been a significant rise in agricultural labor contractors in recent decades, with contractors outnumbering traditional employees in the California counties with the highest farmworker populations. *Id.*

158. Recall that the ALRA was the product of years of advocacy by UFW and other labor organizations. See discussion *supra* Section I.A.

schedules, the limited access to technology, the hard-to-reach homes of workers, the literacy barriers, etc.—to organizing, which prompted creation of the access clause in the first place. Now, without union organizers having access to workers at their workspace, these barriers will be amplified. This destruction will undoubtedly result in less contact with union organizers and less options for fighting abuses in the workplace. The Supreme Court’s decision has effectively eliminated all safeguards for California farmworkers and has left them open for further abuse.¹⁵⁹

To make matters worse, there is a complete lack of urgency by the federal government and other states to pass or enforce any sort of protections for farmworkers. Indifference and intransigence on the part of policymakers concerning this issue will all but ensure further exploitation of farmworkers in the United States. The principal federal employment law for farmworkers in the United States is the Migrant and Seasonal Agricultural Worker Protection Act of 1983.¹⁶⁰ While this law requires disclosure of the terms of employment at the time of recruitment, imposes licensing requirements, and requires farmworker housing to meet certain safety standards,¹⁶¹ it has proven ineffective at combating many abuses.

Take, for example, the current fight over farmworker housing conditions in the State of Texas. In a letter to the Inter-American Commission on Human Rights from June 2020, Texas RioGrande Legal Aid (TRLA) detailed how the Occupational Safety and Health Administration has “failed to enact any enforceable standards or even to conduct on-site inspections” of federally required farmworker housing.¹⁶² The group went on to call this an “egregious and blatant violation” of human rights.¹⁶³ Efforts for accountability at the legislative

159. While farmworkers are subject to some safety regulations like state occupational safety and health departments and the Migrant and Seasonal Agricultural Worker Protection Act of 1983, reporting issues through these mechanisms is often unfruitful. *See, e.g., infra* notes 161–64 and accompanying text. History has shown that the largest gains for increased wages, safety, and dignity in agricultural work has come from the actions of union organizing and collective bargaining. NAT’L FARM WORKER MINISTRY, *supra* note 153. Without the access provision, the ALRA loses much of its efficacy. And, without any new legislative protections at the federal or state level, this loss returns California farmworkers to the dark days of the pre-farmworker rights movement.

160. *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/agriculture/mspa> [<https://perma.cc/X292-N742>].

161. *Id.*

162. Press Release, Tex. RioGrande Legal Aid, TRLA and Southern Migrant Legal Services Urge Greater Human Rights Protections for Food and Farm Workers (June 26, 2020), <https://www.trla.org/press-releases-1/trla-and-southern-migrant-legal-services-urge-greater-human-rights-protections-for-food-and-farm-workers> [<https://perma.cc/DBP9-DPH2>].

163. *Id.*

level, spearheaded by Latino legislators with personal family histories of farm work, have also proven unsuccessful.¹⁶⁴

But Texas is no exception to legislatures that refuse to pass protections for farmworkers. For the past six years, the Florida Legislature has failed to pass heat illness prevention bills.¹⁶⁵ Recently, California's Governor Newsom "vetoed a bill that would have streamlined the process for farm[workers] to elect labor representation."¹⁶⁶ Even at the federal level, there has been little to no movement on introduced legislation to protect farmworkers from heat illness,¹⁶⁷ provide them with the ability to file for immigration protections,¹⁶⁸ or even to improve protections for child agricultural workers.¹⁶⁹ Additionally, efforts to extend complete NLRA and FLSA protections to farmworkers have not even been considered by Congress in recent years. The future of farmworker legislative protection is bleaker now more than ever with the Supreme Court's ruling in *Cedar Point*.

164. During the 86th Legislative Session, Texas State Representative Ramon Romero, Jr., filed House Bill 40 and House Bill 50. See H.B. 40, 86th Leg., Reg. Sess. (Tex. 2019) <https://capitol.texas.gov/billlookup/Text.aspx?LegSess=86R&Bill=HB40> [<https://perma.cc/AV28-3J33>]; H.B. 50, 86th Leg., Reg. Sess. (Tex. 2019) <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB00050I.pdf#navpanes=0> [<https://perma.cc/84CT-WQTJ>]. These bills were meant to address the issue of deplorable migrant farmworker housing conditions by providing for a study as well as penalties for growers who were receiving state dollars for farmworker housing but not meeting housing standards. State Representative Diego Bernal had filed the bill in previous sessions. House Bill 50 was re-introduced by Representative Romero, Jr., in both the 87th and 88th legislative sessions. See H.B. 862, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 883, 88th Leg., Reg. Sess. (Tex. 2023).

165. Sam Bloch, *Florida Farm Workers Endure 116 Dangerously Hot Working Days Every Growing Season. Laws to Protect Them Have Failed Three Years in a Row*, THE COUNTER (July 7, 2020), <https://thecounter.org/florida-laws-fail-to-protect-farm-workers-unsafe-working-days-due-to-heat/> [<https://perma.cc/ZZC5-PPKJ>].

166. *Newsom Vetoes Farmworker Organizing Bill*, BUS. J. (Sept. 23, 2021), <https://thebusinessjournal.com/newsom-vetoes-farmworker-organizing-bill/> [<https://perma.cc/2Wfq-24EM>].

167. Press Release, House, Senate Democrats Introduce Heat Stress Legislation to Protect Farm Workers, Comm. on Educ. & Lab. (Mar. 26, 2021), <https://bobbyscott.house.gov/media-center/press-releases/house-senate-democrats-introduce-heat-stress-legislation-protect-farm> [<https://perma.cc/3FFE-ARLM>]; see also *US HR2193 Asunción Valdivia Heat Illness and Fatality Prevention Act of 2022*, BILL TRACK 50, <https://www.billtrack50.com/billdetail/1353707> [perma.cc/L289-LAYM].

168. Nicole Narea, *The House Passed a Bipartisan Bill That Could Legalize 325,000 Unauthorized Immigrants*, VOX (Dec. 12, 2019), <https://www.vox.com/2019/10/31/20938968/bipartisan-agriculture-farmworker-legalization-immigrant-bill-house-pass> [<https://perma.cc/7N6D-J5GE>].

169. See LEE TUCKER, *FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS* (Lois Whitman & Michael McClintock eds., 2000), <https://www.hrw.org/report/2000/06/02/fingers-bone/united-states-failure-protect-child-farmworkers#> [<https://perma.cc/GR7C-L5MV>].

Conclusion

When I remember Auntie, I remember the joy I felt spending time with her in her little crooked home. I remember her many stories of my grandparents and of my mother's childhood. I remember her small laugh, her bright lipsticks, and her delicious food—there was always so much food. But I also remember her telling me, as a five- or six-year-old, that she had to work twelve-hour days, from sunrise to sundown. I remember her telling me how excited she was for me to go to school, something she had to stop doing at a very early age due to the disruption of harvest seasons. I remember how she could touch a hot plate without even noticing because of the thickness of the skin on her hands from scarring. I remember the way she would ice her hands because the joints of her fingers would swell from rheumatoid arthritis, no doubt from years of difficult work. And I remember thinking to myself how very different our lives were.

The *Cedar Point* ruling is not only legally inconsistent, but also devastating to the farmworker community. In one opinion, the Court abolished all previous conceptions of takings law and the Fifth Amendment, deliberately undercutting the already sparse labor protections afforded to farmworkers in the United States. Further, the Court called into question previous rulings surrounding federal labor protections for all industries and left open the door for a legal justification to further abuses of laborers. The reprehensible desire to uphold property rights in the face of human rights abuses paves a dark path for U.S. labor and civil rights law.