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14
15 UNITED STATES DISTRICT COURT
16 FOR THE EASTERN DISTRICT OF CALIFORNIA
17

18 CEDAR POINT NURSERY and FOWLER PACKING)
CO.,)
19 Plaintiffs,)
20)
21 v.)
22 WILLIAM B. GOULD IV, GENEVIEVE SHIROMA,)
CATHRYN RIVERA-HERNANDEZ, AND)
23 J. ANTONIO BARBOSA, members of the Agricultural)
Labor Relations Board in their official capacities,)
24 Defendants.)

No. 1:16-cv-00185-LJO-BAM
**SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**
Date: March 23, 2016
Time: 9:00 a.m.
Courtroom 4, 7th Floor
Judge Lawrence J. O'Neill

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1 **INTRODUCTION**

2 The Court’s April 18, 2016, order requests supplemental briefing explaining whether a
3 careful balancing of private and governmental interests demonstrates that the Access Regulation
4 of Defendants William B. Gould IV, *et al.* (the Board), imposes on Plaintiffs Cedar Point Nursery
5 and Fowler Packing Company an unreasonable and therefore unconstitutional seizure.

6 “The Supreme Court has adopted a balancing test to determine whether a seizure is
7 reasonable.” *United States v. Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015). To make that
8 determination, a court must balance “the nature and quality of the intrusion on the individual’s
9 Fourth Amendment interests against the importance of the governmental interests alleged to justify
10 the intrusion.” *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

11 As set forth below and in the accompanying declarations and exhibits, the Access
12 Regulation is unconstitutional as applied to Plaintiffs. The interests that it impinges are
13 substantial. In contrast, the governmental interest in allowing warrantless seizures of Plaintiffs’
14 properties is minimal, especially in light of the many alternative avenues open to the Board and
15 unions to inform agricultural employees of their rights.

16 **ARGUMENT**

17 **I**

18 **PLAINTIFFS’ INTERESTS IN AVOIDING**
19 **THE SEIZURE OF THEIR PROPERTIES FOR**
20 **UNION PROSELYTIZING ARE SUBSTANTIAL**

21 The Access Regulation substantially interferes with Plaintiffs’ possessory interests. *Cf.*
22 *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (meaningful governmental interference with
23 a possessory interest results in a seizure under the Fourth Amendment). It does so through threats
24 to sanitation and safety, productivity, and goodwill and reputation.

24 **A. The Access Regulation Threatens Sanitation and Safety**

25 The Access Regulation threatens Plaintiffs’ ability to comply with various safety protocols
26 mandated by law or demanded by Plaintiffs’ vendors and customers. For example, table grapes
27 represent an important product for Fowler. Because these grapes are immediately packed
28 following picking, Fowler’s employees must observe strict sanitation protocols that are enforced

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1 | by third-party auditing firms. *See* Rodriguez Decl. ¶ 8 & Exhs. A-B. But the union representatives
 2 | who, because of the Access Regulation, can reach these employees in the field, are not bound by
 3 | these protocols and have no reason even to be aware of them.¹ That ignorance raises significant
 4 | business and health risks. Because Fowler’s field workers typically congregate during their breaks
 5 | and meal periods near open-faced tubs of grapes, union representatives naturally position
 6 | themselves in this sensitive zone to be able to speak with employees. A union representative could
 7 | easily contaminate this area if the representative had an unprotected open cut or wound, was not
 8 | properly dressed with protective clothing, or had a viral condition, such as influenza,
 9 | mononucleosis, hepatitis, or even the common cold. Fowler’s safety protocols for its
 10 | employees—such as requiring packers to cover their street clothes with aprons and forbidding
 11 | employees exhibiting symptoms of illness to work²—minimize these risks. Rodriguez Decl. ¶ 7.
 12 | The Access Regulation thwarts Fowler’s ability to implement these protocols effectively. As a
 13 | result, the Access Regulation raises substantially the risk that Fowler will be found out of
 14 | compliance during an audit. *Id.* ¶ 8. *See id.* Exh. A at 2 (Audit Question 1.03.04 requiring
 15 | documentation for “daily incidents” and “[u]nusual [o]ccurrence[s]”); *id.* Exh. B at 16 (Audit
 16 | Questions 2.10.01 through 2.10.05 regarding sanitation guidelines for workers, including
 17 | requirements for illness and wounds, as well as eating, drinking, and even gum chewing in the
 18 | growing areas); *id.* at 19 (Audit Question 2.10.12 regarding the presence of foreign material in the
 19 | growing areas).

20 | For Cedar Point, the Access Regulation directly thwarts its ability to ensure a safe working
 21 | environment for its employees. During harvest time, operations on Cedar Point’s property are fast-
 22 | paced and involve a variety of heavy equipment. For employee safety, Cedar Point strictly

24 | ¹ Although in theory Fowler could attempt to instruct union representatives about these protocols,
 25 | such efforts would create a separate and serious risk of precipitating a charge of unfair labor
 26 | practices. *See* Cal. Code Regs. tit. 8, § 20900(e)(5)(C) (“Interference by an employer with a labor
 27 | organization’s right of access . . . may constitute an unfair labor practice . . .”). *Cf.* Parnagian
 28 | Decl. ¶ 8 (noting that, in July, 2015, the union filed labor charges contending that Fowler had
 denied the union access to its property).

² Fowler operates an on-site medical clinic that provides free medical care for its employees and
 their families. Parnagian Decl. ¶ 4.

1 regulates when and where employees may stand or walk on the property, especially within the trim
 2 sheds (the areas where the strawberry plants are prepared for shipping). Adhering to these
 3 protocols is essential for safety. For example, during harvest time, heavy bins are placed on tracks
 4 within the trim sheds to facilitate the transport of plants from the coolers to the packing areas. If
 5 one does not pay attention to where one is standing, one can easily be smashed by a moving 2,500-
 6 pound bin. Similarly, if one does not know the areas where forklifts or other heavy equipment
 7 operate within the trim sheds, one can very easily be struck by the equipment. These concerns are
 8 exacerbated when unions seek to again access (as the United Farm Workers did) during early
 9 morning hours when it is still dark on the property. Halpenny Decl. ¶ 7.

10 **B. The Access Regulation Threatens Productivity**

11 The Access Regulation threatens the productivity of Plaintiffs and their employees. For
 12 example, union representatives typically gain access to Fowler's property during employees' meal
 13 period. Fowler's employees frequently fail to eat their lunches during union presentations, and
 14 consequently typically ask their supervisors for additional time to eat following the presentations.
 15 Although Fowler grants these requests as a courtesy to its employees, this unnecessary loss of time
 16 has a negative economic impact. It hurts Fowler's piece-rate employees, who lose additional
 17 opportunities to pick. It also hurts Fowler, given that many of its products—such as table
 18 grapes—are extremely perishable. Rodriguez Decl. ¶ 9.

19 Similarly for Cedar Point, union access has a direct and negative impact on productivity
 20 and on employee morale. For example, the union protests staged at Cedar Point last year
 21 substantially increased the amount of time required to do the same amount of strawberry trimming
 22 work, and resulted in the departure of dozens of employees. McEwen Decl. ¶ 7; Garcia Decl. ¶ 7;
 23 Halpenny Decl. ¶ 8.

24 **C. The Access Regulation Threatens Goodwill and Reputation**

25 The Access Regulation hurts Plaintiffs' goodwill and reputation. *Cf. Marrero v. City of*
 26 *Hialeah*, 625 F.2d 499, 514 (5th Cir. 1980) (injury to business reputation is compensable as the
 27 result of the violation of one's Fourth Amendment rights), *rejected on other grounds by WMX*
 28 *Technologies, Inc. v. Miller*, 197 F.3d 367, 375-76 & n.4 (9th Cir. 1999) (en banc) (indirect

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1 | impairment of business goodwill is not constitutionally actionable unless accompanied by direct
2 | governmental violation of one’s constitutional rights). For example, Fowler has expended
3 | substantial effort to maintain good employee-management relations, through the establishment of
4 | an anonymous toll-free complaint hotline, among other initiatives. The Access Regulation
5 | threatens this good relationship because it paints Fowler as a wrongdoer. Not surprisingly,
6 | Fowler’s employees interpret the repeated union intrusions, allowed by the government, as proof
7 | of that wrongdoing. A similar sentiment is created among Fowler’s vendors and customers,
8 | making it less likely that they will continue to do business with Fowler. Rodriguez Decl. ¶ 10.

9 | In like manner, union access to Cedar Point has resulted in the demoralization and loss of
10 | employees. See McEwen Decl. ¶ 7; Garcia Decl. ¶ 7. Following last year’s union protest, many
11 | Cedar Point employees were visibly shaken and scared by what had transpired. Halpenny Decl.
12 | ¶ 8. Since that protest, every labor contractor that has contacted Cedar Point has inquired about
13 | the ongoing “union” issue and has expressed concern about its business relationship with Cedar
14 | Point. *Id.* ¶ 9.

15 | **II**

16 | **THE BOARD’S INTERESTS IN SEIZING**
17 | **PLAINTIFFS’ PROPERTY FOR UNION**
18 | **PROSELYTIZING ARE INSUBSTANTIAL**

19 | The Board contends that it has substantial interests in “safeguard[ing] the rights of
20 | agricultural employees to freedom of association, self-organization, and collective bargaining.”
21 | Opp’n to Prelim. Inj. 11. Assuming *arguendo* that these are significant governmental interests, the
22 | Board has made no showing that it needs the extraordinary measure of warrantless seizures of
23 | Plaintiffs’ properties to vindicate them. See *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th
24 | Cir. 2005) (a warrantless seizure is presumptively unreasonable and the burden is on the
25 | government to justify it). See also *United States v. 4,432 Mastercases of Cigarettes*, 448 F.3d
26 | 1168, 1179 (2006) (a warrantless inspection is unreasonable if unnecessary to further the larger
27 | regulatory scheme).

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1 The Board cites testimony from recent hearings that, despite decades of efforts,
2 farmworkers are unaware of their rights.³ Opp'n to Prelim. Inj. 14. It is not clear why the Board
3 believes that this evidence supports the need to seize Plaintiffs' property. After all, the Access
4 Regulation has been in existence for decades too. That it has yet to succeed in informing laborers,
5 as a class, of their rights, is a bizarre reason to conclude that the Access Regulation nevertheless
6 is necessary to inform Plaintiffs' employees of their rights. At most, the Board's purported
7 evidence demonstrates that there are communication issues with today's typical farmworker.
8 Opp'n to Prelim. Injunc. 14. But such evidence does not establish that communication issues exist
9 with respect to Plaintiffs' employees. In fact, the evidence is to the contrary. *See* Rodriquez Decl.
10 ¶ 4 (vast majority of Fowler's employees can communicate in Spanish); Halpenny Decl. ¶ 4 (vast
11 majority of Cedar Point's employees can communicate in Spanish). *See also* McEwen Decl. ¶ 5;
12 Garcia Decl. ¶ 5. In any event, the very communication issues that the Board raises as a reason
13 for needing the Access Regulation would apply even with the Access Regulation: a person who
14 speaks only an indigenous language will not understand English or Spanish any better simply
15 because these unfamiliar languages are spoken in-person as opposed to on the radio or through
16 other means. *Cf.* Rodriquez Decl. ¶ 4 (only 1% of Fowler employees cannot converse in English
17 or Spanish); Halpenny Decl. ¶ 4 (no knowledge of any Cedar Point employee who cannot converse
18 in English or Spanish).

19 More importantly, ample alternative means exist for the Board and unions to access
20 Plaintiffs' employees. These employees can be reached after hours at their hotels or their homes.
21 Fahner Decl. ¶ 5; Parnagian Decl. ¶ 5. *Cf. Lechmere, Inc. v. Nat'l Labor Relations Bd.*, 502 U.S.
22 527, 537 (1992) (Under federal labor law, labor interests prevail over private property rights only

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26 ³ To the extent that the Board seeks judicial notice of these documents to establish facts relevant
27 to the Board's legal defense of the Access Regulation, notice of such "legislative" facts would be
28 improper. *See* Fed. R. Evid. 201(a) (authorizing judicial notice of adjudicative not legislative
facts). *Cf. Qualley v. Clo-Tex Int'l., Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000) (explaining that
legislative facts do not relate directly to the litigants and are used by courts only in construing law
or policy).

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1 in “the rare case” that employees cannot be reached “through the usual channels.”). They
2 generally have cellular or smart phones. Sanders Decl. ¶ 5; Arias Decl. ¶ 5; McEwen Decl. ¶ 5;
3 Garcia Decl. ¶ 5. They regularly speak about Facebook, Sanders Decl. ¶ 5, as well as Instagram
4 and Snapchat, McEwen Decl. ¶ 6; Garcia Decl. ¶ 6, thereby revealing a knowledge and familiarity
5 with social media and presumably an accessibility through these channels. *Cf. Lechmere, Inc.*, 502
6 U.S. at 540 (Under federal labor law, labor interests prevail over private property rights generally
7 only if employees “are isolated from the ordinary flow of information that characterizes our
8 society.”). The United Farm Workers itself acknowledges that modern methods of
9 communications are effective. The Union runs a multi-channel and multi-state radio
10 network—Radio Campesina—which disseminates worker-related information. Desormeaux Decl.
11 Exh. A. The Union runs radio advertisements to reach farm workers. *Id.* Exhs. B & C. It also
12 maintains a webpage, as well as a substantial Facebook presence. *Id.* Exhs. D & E. Presumably,
13 the Union would not avail itself of these modes of communication if it believed that farm laborers
14 could not be reached through them.

15 Many avenues are available to the Board to achieve any interest it may have in the
16 education of Plaintiffs’ employees, without recourse to the extraordinary method of warrantless
17 seizures of Plaintiffs’ property. The Access Regulation is not necessary to achieve the Board’s
18 interests.

19 **CONCLUSION**

20 The Access Regulation authorizes warrantless seizures of Plaintiffs’ properties. These
21 seizures substantially interfere with Plaintiffs’ business operations. The Board’s interests in these

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1 | seizures are slight. Therefore, the seizures are unreasonable, and the Access Regulation, as applied
2 | to Plaintiffs, is unconstitutional. A preliminary injunction should issue.

3 | DATED: May 2, 2016.

4 | Respectfully submitted,

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