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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 v. )

21 WILLIAM B. GOULD IV, GENEVIEVE SHIROMA, )  
22 CATHRYN RIVERA-HERNANDEZ, AND )  
23 J. ANTONIO BARBOSA, members of the Agricultural )  
Labor Relations Board in their official capacities, )

24 Defendants. )  
25  
26  
27  
28

No. 1:16-cv-00185-LJO-BAM

**PLAINTIFFS' OPPOSITION  
TO DEFENDANTS' MOTION  
TO DISMISS COMPLAINT**

Date: May 25, 2016  
Time: 8:30 a.m.  
Courtroom 4, 7th Floor  
Judge Lawrence J. O'Neill

Action Filed: February 16, 2016

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## INTRODUCTION

This is a challenge to a California Agricultural Labor Relations Board (Board) regulation that permits union organizers to enter private agricultural property without the consent of the property owner for the purpose of soliciting new members. Cal. Code Regs. tit. 8, § 20900. Plaintiffs Cedar Point Nursery and Fowler Packing Co. challenge the regulation as applied to their properties. These agricultural businesses have in the past year been subjected to disruptive protests by United Farm Workers organizers who entered their property under the guise of the access regulation. *See* Compl. ¶¶ 30, 38. They seek a permanent injunction preventing the Board from enforcing the regulation against them in the future.

The access regulation violates the Fifth Amendment to the United States Constitution. The regulation amounts to an easement that permits unwanted third parties to enter Plaintiffs' property without permission for 120 days per year, subject to certain time, place, and manner restrictions and a notice requirement. Cal. Code Regs. tit. 8, § 20900(e)(1)-(3). The Board has taken that easement for the benefit of the Union without providing a mechanism for paying just compensation. Therefore, it has violated the Fifth Amendment. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (government must pay just compensation when it takes an easement across private property).

Indeed, the access regulation's disregard of private property rights is so blatant that it also violates the Fourth Amendment's Seizure Clause. That Clause protects "an individual's possessory interests in [] property" from "meaningful interference" by the government. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). It matters little whether this interference comes from direct government action or from private persons prompted by government acquiescence. *Id.* Either way, the access regulation violates the Fourth Amendment by depriving Plaintiffs of their fundamental right to exclude strangers from their property. *See Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." (citation omitted)); *Rawlings v. Kentucky*,

///

1 448 U.S. 98, 112 (1980) (Blackmun, J., concurring) (arguing that the “‘right to exclude’ often may  
2 be a principal determinant in the establishment of a legitimate Fourth Amendment interest”).

3 The Board has moved to dismiss this action for failure to state a claim pursuant to Federal  
4 Rule of Civil Procedure 12(b)(6). However, as explained in detail below, the Board’s arguments  
5 in defense of the access rule are unpersuasive. This Court should deny the Board’s motion to  
6 dismiss.

### 7 HISTORY OF THE ACCESS REGULATION

8 California enacted the Agricultural Labor Relations Act (the Act), Cal. Lab. Code § 1140,  
9 *et seq.*, in 1975 to “‘ensure peace in the agricultural fields’” and “‘bring certainty . . . to a  
10 presently unstable and potentially volatile condition in the state.’” *ALRB v. Superior Court*  
11 (*Pandol & Sons*), 16 Cal. 3d 392, 398 (1976) (citation omitted). The Act was the product of a  
12 carefully crafted “‘compromise among the various interests.’” *Id.* at 424 (Clark, J., dissenting)  
13 (citation omitted). As enacted, it did not include any provision mandating access for union  
14 organizers.

15 Nevertheless, the newly created Board immediately promulgated an emergency access  
16 regulation, which took effect just one day after the Act did. *Id.* at 400 (majority opinion).  
17 Agricultural businesses promptly challenged the regulation in California state court, claiming that  
18 the regulation violated the Takings Clause and the Due Process Clause of the Fifth Amendment.  
19 *Id.* at 409-11. Two groups of plaintiffs prevailed in state trial courts, which temporarily enjoined  
20 the Board from enforcing the access regulation. *Id.* at 401.

21 In a 4-3 decision, the California Supreme Court vacated the injunctions. *Id.* at 421. The  
22 Court believed that since “‘the inaccessibility of employees makes ineffective the reasonable  
23 attempts by nonemployees to communicate with them through the usual channels, the right to  
24 exclude from property [must be] required to yield.’” *Id.* at 406 (citation omitted). Therefore, the  
25 California Supreme Court deemed it unnecessary to decide whether the particular facts of a union  
26 protest violated the property owner’s constitutional rights on a case-by-case basis. *Id.* at 409. It  
27 instead adopted a blanket rule requiring access in every case, reasoning that the regulation does  
28 not impinge upon private property rights because a rational relationship exists between the access

1 regulation and the purposes of the Act. *See id.* at 410. As a result, the union access regulation has  
2 remained virtually unchanged in California for over 40 years.

3 **ARGUMENT**

4 **I**

5 **PANDOL & SONS DOES NOT**  
6 **DICTATE THE OUTCOME OF THIS CASE**

7 The Board first argues that this Court should effectively defer to the California Supreme  
8 Court’s ruling in *Pandol & Sons* because the Plaintiffs have not presented a “compelling reason”  
9 to revisit it. Yet this Court needs no “compelling” reason to do so. “Of course, federal courts are  
10 not bound by state court decisions on matters of federal law.” *Key v. Wise*, 629 F.2d 1049, 1058  
11 (5th Cir. 1980) (citing *Sola Electric Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942)); *see also*  
12 *Lucero v. Sears Holding Mgmt. Corp.*, No. 14-cv-1620, 2014 WL 6984220, at \*4 (S.D. Cal. Dec. 2,  
13 2014). This Court owes no deference to the California Supreme Court and must decide the issue  
14 on its own according to the correct federal constitutional standards.

15 Moreover, the United States Supreme Court’s takings jurisprudence has significantly  
16 advanced since the *Pandol & Sons* decision. In 1976, the Court had yet to explicitly recognize that  
17 a physical invasion of property constitutes a *per se* taking “without regard to the public interests  
18 that it may serve,” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), nor  
19 had it made clear that the taking of an easement is still a *per se* physical taking, *Nollan*, 483 U.S.  
20 at 831. In fact, it had just retreated from holding that union protesters had a First Amendment right  
21 to invade private property. *See Amalgamated Food Employees Union Local 590 v. Logan Valley*  
22 *Plaza, Inc.*, 391 U.S. 308, 325 (1968), *overruling recognized by Hudgens v. NLRB*, 424 U.S. 507,  
23 517-18 (1976). And in the interim the Court has reemphasized that “§ 7 [of the federal National  
24 Labor Relations Act] simply does not protect nonemployee union organizers except in the rare case  
25 where ‘the inaccessibility of employees makes ineffective the reasonable attempts by  
26 nonemployees to communicate with them through the usual channels.’” *Lechmere, Inc. v. NLRB*,  
27 502 U.S. 527, 537 (1992) (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).  
28 All in all, courts and commentators have observed that the Supreme Court has been increasingly

1 protective of private property rights since 1976. *See Wash. Suburban Sanitary Comm'n v. Utilities,*  
2 *Inc. of Md.*, 775 A.2d 1178, 1200 (Md. 2001) (“[T]he more recent decisions of the United States  
3 Supreme Court have been particularly protective of property rights in the takings context.”);  
4 Bernard H. Siegan, *Non-Zoning Is the Best Zoning*, 31 Cal. W. L. Rev. 127, 135 (1994) (“Since  
5 1987, the U.S. Supreme Court has become much more protective of property rights than previously  
6 and has substantially limited the land use powers of states and municipalities.”).

7 The *Pandol & Sons* opinion is inconsistent with this trend. The majority placed “property  
8 rights” in scare quotes and easily concluded that they must yield “whenever” they conflict with the  
9 employees’ rights to learn about the benefits of union membership. *Pandol & Sons*, 16 Cal. 3d at  
10 406 (majority opinion). That is in stark contrast with cases like *Loretto*, *Nollan*, and *Lucas v.*  
11 *South Carolina Coastal Council*, 505 U.S. 1003 (1992), all of which recognized takings without  
12 regard to economic impact or other factors. *Pandol & Sons* also purported to apply the federal  
13 *Babcock & Wilcox* rule, but as *Lechmere* demonstrates, it did so incorrectly. Federal courts *do*  
14 respect the property rights of employers whenever possible, permitting access only when the  
15 employees live on an employer’s property. *Lechmere*, 502 U.S. at 539. The California Supreme  
16 Court did not do the same.<sup>1</sup>

17 This Court should certainly not give binding effect to the California Supreme Court’s  
18 decision, nor should it afford the majority opinion any deference. Instead, the Court should  
19 evaluate the access regulation according to well-established property rights principles that have  
20 been articulated since *Pandol & Sons*. Under these principles, this Court should agree with the  
21 *Pandol & Sons* dissent that “the regulation constitutes an unwarranted infringement on  
22 constitutionally protected property rights.” *Pandol & Sons*, 16 Cal. 3d at 421 (Clark, J.,  
23 dissenting).

24 \_\_\_\_\_  
25 <sup>1</sup> Not only has the law changed since the regulation was upheld, the facts on the ground have  
26 changed as well. There are now myriad other ways to reach workers, including social media,  
27 cellular phones, and e-mail. Even assuming workers lack access to these technologies, the workers  
28 do not live on site and are accessible to the Union at any time other than when they are at work.  
For example, Cedar Point houses its workers in hotels in Klamath Falls, Oregon, and Fowler’s  
employees generally live in their own housing. Compl. ¶¶ 27, 37. The Union does not need to  
invade private property to reach these workers.



II

**THE UNION ACCESS REGULATION  
VIOLATES THE TAKINGS CLAUSE<sup>2</sup>**

The right to exclude unwanted persons from private property “has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” *Loretto*, 458 U.S. at 435. That is why the Supreme Court has recognized that deprivation of that right without compensation violates the Fifth Amendment, regardless of the scope of the intrusion. *Id.* at 434-35. It follows that a government requirement that a property owner recognize an easement across his property for the benefit of third parties is plainly unconstitutional. *Nollan*, 483 U.S. at 831.

The Board does not dispute that the access regulation grants an easement. Instead, it argues that the easement should not be treated as a *per se* taking because it is not a “permanent physical occupation” of property. Motion to Dismiss at 6-8. In essence, the Board argues that the easement is “temporary” because union organizers do not have around the clock access to private property. That is incorrect. Despite time, place, and manner restrictions in the regulation, union organizers are granted the right to enter private property for 120 days each year as long as the regulation is in effect. Plaintiffs and other California agricultural businesses must surrender their right to exclude trespassers permanently, subject to the whims of the union.

An easement is no less a property right just because it cannot be utilized at all times. The Supreme Court has consistently held that similar access easements are takings without consulting other factors. For example, in *United States v. Causby*, 328 U.S. 256 (1946), the Court said that periodic low-altitude overflights amounted to an easement across private property even though they did not render the property uninhabitable. *Id.* at 261-63, 67. And in *Nollan*, the Court stated unequivocally that “[h]ad California simply required the Nollans to make an easement across their

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<sup>2</sup> Plaintiffs recognize that this Court held they were unlikely to succeed on the merits of their Fifth Amendment argument in last month’s preliminary injunction decision. *See Cedar Point Nursery v. Gould*, 1:16-cv-00185, 2016 WL 1559271, at \*4-6 (E.D. Cal. Apr. 18, 2016). To the extent this Court finds that it is bound by the law of the case doctrine to reject Plaintiffs’ takings argument at this stage, *see Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc), Plaintiffs present the argument in order to preserve it for appeal.

1 | beachfront available to the public on a permanent basis in order to increase public access to the  
2 | beach, . . . we have no doubt there would have been a taking.” *Nollan*, 483 U.S. at 831; *see also*  
3 | *Evers v. Custer Cnty.*, 745 F.2d 1196, 1201-02 (9th Cir. 1984) (“The Supreme Court held that the  
4 | government could not create a public easement, ‘result[ing] in an actual physical invasion of the  
5 | privately owned [property],’ without exercising its power of eminent domain and paying just  
6 | compensation.” (citation omitted) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 180  
7 | (1979))).

8 |         There is no relevant difference between the easement in this case and a “permanent” one.  
9 | The Supreme Court implicitly recognized this in *Causby* when it found the distinction between a  
10 | temporary and permanent easement relevant only to the amount of compensation. *Causby*, 328  
11 | U.S. at 268 (“Since on this record it is not clear whether the easement taken is a permanent or a  
12 | temporary one, it would be premature for us to consider whether the amount of the award made  
13 | by the Court of Claims was proper.”). *Nollan* is another example; it makes little sense to say that  
14 | an easement is temporary simply because it cannot be used throughout the year or for all hours of  
15 | the day. Otherwise, the Coastal Commission could avoid paying compensation for easements by  
16 | restricting their use to the daylight hours or the summer months. Those easements would still be  
17 | permanent, because they would continue in perpetuity unless the Commission relinquished them.<sup>3</sup>

18 |         A recent case out of Federal Circuit, *Otay Mesa Property, L.P. v. United States*, 670 F.3d  
19 | 1358 (Fed. Cir. 2012), is illustrative. There, the court held that the imposition of an easement to  
20 | “install, maintain, and service sensors” on Otay Mesa’s property was a *per se* taking. *Id.* at 1365.  
21 | Specifically relevant here, it rejected the argument that an easement is “temporary” just because  
22 | it “ends on occurrence of a specified event.” *Id.* at 1364. Instead, in temporary physical taking  
23 | cases, “the takings at issue usually have specific end dates by the time just compensation is

24 | \_\_\_\_\_  
25 | <sup>3</sup> Even if the easement were “temporary,” that would not absolve the Board from liability.  
26 | Temporary easements are routinely condemned through eminent domain. *See, e.g., Sacramento*  
27 | *Area Flood Control Agency, Inc. v. Dhaliwal*, 236 Cal. App. 4th 1315, 1320, 1326 (2015)  
28 | (affirming a jury award of \$4,000 in just compensation for condemnation of a “temporary  
construction easement”); *Kern River Gas Transmission Co. v. Clark Cnty.*, 757 F. Supp. 1110 (D.  
Nev. 1990) (eminent domain proceeding to acquire a “temporary easement”). If the government  
must use its power of eminent domain to take an easement, then doing so without a mechanism for  
compensation violates the Fifth Amendment.

1 awarded.” *Id.* at 1365. The difference between a temporary and a permanent easement is not the  
2 scope of the easement, but the nature of its termination.

3 Here, the easement granted to union organizers by the access regulation has no termination  
4 date. It ceases to exist only if the Board repeals the regulation. *Cf. id.* at 1367 (“[T]he government  
5 has been held to have permanently taken property, despite the fact that ‘[a]ll takings are  
6 “temporary,” in the sense that the government can always change its mind at a later time.’ ”  
7 (quoting *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991))). It is therefore as  
8 permanent as an easement can be, even though the text of the regulation limits its scope. The  
9 Board cannot evade liability simply because the easement does not permit ongoing access 365 days  
10 per year.

11 Nor does *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), save the regulation.  
12 In *PruneYard*, the Court held that “a law limiting a property owner’s right to exclude certain  
13 speakers from an already publicly accessible shopping center did not take the owner’s property.”  
14 *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2429 (2015) (discussing *PruneYard*). But *PruneYard*  
15 does not extend as far as the Board would have it. In *Nollan*, the Court rejected a similar  
16 argument, distinguishing *PruneYard* because the shopping center owner had chosen to open the  
17 property to the public, while the Nollans had not. *See Nollan*, 483 U.S. at 832 n.1 (“The holding  
18 of [*PruneYard*] is not inconsistent with this analysis, since there the owner had already opened his  
19 property to the general public . . . .”); *but see id.* at 854-55 (Brennan, J., dissenting) (arguing that  
20 *PruneYard* prevents takings liability for the easement in *Nollan*).<sup>4</sup> Like in *Nollan*, the easement  
21 here is over quintessentially private property. Its effect would be to transform the property from  
22 a private business to a free-for-all for union protesters. *PruneYard* does not sanction this result.

23 In summary, the access regulation violates the Fifth Amendment because it commandeers  
24 an uncompensated easement across agricultural property for the benefit of union organizers. The  
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26 <sup>4</sup> California courts have also limited the scope of the *PruneYard* rule to large public  
27 accommodations for similar reasons. *See Planned Parenthood v. Wilson*, 234 Cal. App. 3d 1662,  
28 1670 (1991) (“[S]maller businesses or commercial establishments which do not assume this  
societal role by public invitation and dedication of private property should not fall within the scope  
of the *Robins* rule.”).

1 regulation gives organizers the right to enter private property for 120 days per year—a right they  
2 use to conduct disruptive protests that directly harm agricultural employers. The Takings Clause  
3 does not permit the government to deprive a property owner of his right to exclude without  
4 providing a mechanism for compensation. Therefore, the regulation is unconstitutional. The  
5 Board’s motion to dismiss the Fifth Amendment claim should be denied.<sup>5</sup>

6 **III**  
7 **THE ACCESS REGULATION**  
8 **EFFECTS AN UNCONSTITUTIONAL SEIZURE**

9 Once again in the Fourth Amendment claim, the Board concedes a central premise of  
10 Plaintiffs’ argument. It does not dispute that the regulation effects a seizure of property. The  
11 Board instead argues that the seizure is reasonable because Plaintiffs’ interests are outweighed by  
12 the “important policy” stated in the access regulation itself—safeguarding the rights of agricultural  
13 employees to freedom of association, self-organization, and collective bargaining. *See Soldal v.*  
14 *Cook Cnty.*, 506 U.S. 56, 71 (1992) (the reasonableness determination involves “careful balancing  
15 of governmental and private interests”).

16 The Board is wrong. As Plaintiffs argued in their preliminary injunction motion, this case  
17 is analogous to *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006). There, the Fourth  
18 Circuit recognized that a government map allowing tourists to cut across the plaintiff’s private land  
19 created a valid Fourth Amendment claim. *Id.* at 488-89. Here, just as in *Presley*, the government  
20 is commandeering an easement on Plaintiffs’ property for the benefit of third parties. And here,  
21 just as in *Presley*, the fact that this intrusion on property rights is “limited” in some aspects is

22 ///

23 \_\_\_\_\_  
24 <sup>5</sup> The Board argues in a footnote that Plaintiffs’ takings claims are unripe under *Williamson County*  
25 *Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), because  
26 of a pending dispute between the Union and Cedar Point that is currently pending before the Board.  
27 This Court held Plaintiffs’ claims were ripe in the context of the preliminary injunction decision.  
28 *Cedar Point Nursery*, 2016 WL 1559271, at \*3-4. And in any event, the Board proceedings have  
nothing to do with the dispute in this case over the constitutionality of the access rule, which will  
continue to apply to Plaintiffs and all agricultural businesses until it is repealed. Cedar Point is  
arguing before the Board that the Union violated the regulation, not that the regulation does not  
apply.

1 irrelevant to the constitutional analysis. *See id.* at 482-83 (police “responded regularly” to eject  
2 unwanted parties from the property).

3 If anything, government interference with Plaintiffs’ property in this case is even more  
4 flagrant. In *Presley*, the property owners could at least call on law enforcement to eject unwanted  
5 third parties. *Id.* By contrast, any attempt by the property owners here to take back control of their  
6 own property would subject them to further charges under the access regulation. *See* Cal. Code  
7 Regs. tit. 8, § 20900(e)(5)(C). That is no accident. Because the ultimate objective of the access  
8 regulation is to allow union organizers onto private property, government interference with private  
9 property is even greater here. *See Jacobsen*, 466 U.S. at 113 (acts of private persons implicate the  
10 Fourth Amendment if made with “participation or knowledge of any government official” (quoting  
11 *Walter v. United States*, 447 U.S. 649, 662 (1980))).

12 More importantly, these intrusions on private property rights do nothing to advance the  
13 regulation’s stated interests.<sup>6</sup> First, freedom of association “presupposes a freedom not to  
14 associate.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). While union organizers already  
15 have access to workers whenever they are not at work, but workers who wish not to join a union  
16 do not have many opportunities to avoid union organizers while they must remain at work. The  
17 Board has provided no reason why this Court should advance the freedom of association by  
18 preserving, rather than invalidating, the access regulation.

19 As to the remaining interests, the Board does not explain how depriving businesses of their  
20 right to exclude non-employees from their property furthers the Board’s interest in promoting  
21 self-organization and collective bargaining. It is not at all clear why the union organizers must be  
22 on the employer’s property in order to effectively organize employees. “So long as nonemployee  
23 union organizers have reasonable access to employees outside an employer’s property, the

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26 <sup>6</sup> In deciding Plaintiffs’ motion for a preliminary injunction, the Court requested supplemental  
27 briefing on this issue. If there is an issue of disputed fact regarding the balancing of these interests,  
28 judgment as a matter of law at this stage is inappropriate. *See Mui Ho v. Toyota Motor Corp.*, 931  
F. Supp. 2d 987, 998 (N.D. Cal. 2013) (whether the possibility of headlamp failure after years of  
use is an “unreasonable safety risk” is a question of fact inappropriate for resolution at the  
pleadings stage).

1 requisite accommodation has taken place.” *Lechmere*, 502 U.S. at 538.<sup>7</sup> The access regulation  
2 serves no purpose that must be accomplished on the employer’s property.

3 While it may be convenient for a State to commandeer employers’ property and create a  
4 forum for union organizers with a captive audience, “inconvenience is a cost which the Fourth  
5 Amendment was intended to impose.” Lewis R. Katz, *In Search of a Fourth Amendment for the*  
6 *Twenty-First Century*, 65 Ind. L.J. 549, 577 (1990). Plaintiffs have stated a valid Fourth  
7 Amendment claim and the Board’s motion to dismiss that claim should be denied.

8 **CONCLUSION**

9 For the foregoing reasons, the Board’s motion to dismiss Plaintiffs’ claims should be  
10 denied.

11 DATED: May 10, 2016.

12 Respectfully submitted,

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22  
23  
24  
25  
26 <sup>7</sup> Plaintiffs have pleaded sufficient facts to permit the Court to infer that Plaintiffs’ employees are  
27 available to union organizers outside of the workplace. For example, Plaintiffs alleged that both  
28 Fowler’s and Cedar Point’s employees do not live on the premises. Compl. ¶¶ 27, 37. Since the  
employees must leave the premises at the end of the workday, union organizers do not have to  
invade private property to speak to them.