

COMMENTS

Center For Environmental Law Prize Winning
Comment

Excluded and Isolated: Farmworker Vulnerability to Climate Change, Inadequate Regulations, and Takings Claims

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I. INTRODUCTION

In Gonzales, California, Rosa Villegas woke up at two in the morning to head into the south Salinas Valley fields where she would start bagging romaine lettuce.¹ But on this early morning, the sky glowed red and was smoky from the fires burning in the Santa Lucia mountains, fueled by the dry conditions of California summer months, exacerbated by record-breaking high temperatures in the area.² Despite the smoky conditions that did not allow her to see to the edge of the field and the poor air quality that affected her lungs, Villegas and thousands of other farmworkers continued to work.³ In another field in the California Central Valley, farmworker Rosa Sanchez and fifty-two other people were hit by a wave of drifting pesticides sprayed in another field, where six were taken to the hospital due to nausea and shortness of breath.⁴ Harsh working conditions for agricultural workers are not limited to California, nor to just pesticides and wildfires. In Baton Rouge, Louisiana, the Department of Labor filed a complaint, a motion for a temporary restraining order, and a preliminary injunction against Rivet and Sons LLC and its owner to prevent them from retaliating against its workers for their requests for adequate water and food.⁵ The complaint derived from the employer denying temporary agricultural workers adequate water while working on the fields and screaming obscenities, aiming guns at the workers, and even firing shots at them.⁶ In 2019, New York introduced legislation that would amend a state law that historically

1. Alejandra Borunda, *An Extraordinary Summer of Crises for California’s Farmworkers*, NAT’L GEOGRAPHIC (Sept. 1, 2020), <https://www.nationalgeographic.com/science/article/extraordinary-summer-crisis-california-farmworkers>.

2. Kasha Patel, *California Heatwave Fits a Trend*, NASA EARTH OBSERVATORY (Sept. 6, 2020), <https://earthobservatory.nasa.gov/images/147256/california-heatwave-fits-a-trend>.

3. Borunda, *supra* note 1.

4. *Session 4: Pesticides*, NAT’L FARM WORKER MINISTRY, <https://nfwm.org/resource-center/harvest-of-justice/farm-workers-the-environment-harvest-of-justice-2020/pesticides/> (last visited Mar. 18, 2022).

5. Trial Motion, *Walsh v. Rivet et al.*, 2021 WL 9216664 (M.D. La.).

6. *Federal Court Orders Louisiana Farm, Owners to Stop Retaliation After Operator Denied Workers’ Request for Water, Screamed Obscenities, Fired Shots*, U.S. DEP’T. OF LABOR (Oct. 28, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20211028-0>.

excludes agricultural workers from collective bargaining rights.⁷ On top of all of this, almost ubiquitously across the United States, agricultural workers face sweltering temperatures topping 100°F in the midst of summer, and these temperatures worsen every year due to climate change, resulting in numerous heat-related fatalities and increased use of pesticides.⁸

To ensure the safety and health of agricultural workers in the face of climate change, unionization and stronger federal policies protecting farmworkers' access to healthcare, adequate pay, time off, living conditions, and insulation from unsafe working conditions are needed. Despite their vital and indispensable role in harvesting crops that end up on most Americans' dinner tables, federal laws have historically failed to protect vulnerable workers that the nation depends on for food. More troubling is that recent case law has impeded unionization efforts where constitutional takings challenges now present a hurdle for union access.

This Comment presents the conflict between agricultural worker health and safety in the face of growing environmental challenges and the historical labor laws that have excluded them from their scope of protection, and highlights the importance of unions within the labor force. This Comment analyzes the recent Supreme Court decision *Cedar Point Nursery v. Hassid* and reflects on the shadow future takings claims casts on unionization. This Comment concludes with proposed solutions for existing federal regulations and union access going forward.

II. DEMOGRAPHICS AND LABOR CONDITIONS

A. *Demographics*

Approximately 2.4 million workers perform about two-thirds of all labor in U.S. agriculture, producing and packing crop and livestock products.⁹ From 2015–16, 76 percent of U.S. farmworkers were not born in the United States and three-quarters of these workers were people of

7. S. Res. 2837, 2019–2020 Leg., Reg. Sess. (N.Y. 2019).

8. Daniela Sirtori-Cortina & Elizabeth Elkin, *Overheated, Underprotected: Climate Change is Killing U.S. Farmworkers*, BLOOMBERG (Aug. 12, 2021), <https://www.bloomberg.com/news/articles/2021-08-12/farmworkers-overheat-on-frontlines-of-climate-change>.

9. UNION OF CONCERNED SCIENTISTS, FARMWORKERS AT RISK: THE GROWING DANGERS OF PESTICIDES AND HEAT 1–2 (2019), <https://www.ucsusa.org/sites/default/files/2019-12/farmworkers-at-risk-report-2019-web.pdf>.

color,¹⁰ mostly Latino and Indigenous.¹¹ According to a 2015–16 study by the Department of Labor, 69 percent of farmworkers were from Mexico, 6 percent from Central America, and 24 percent were born in the United States; in addition, 83 percent of all farmworkers and 35 percent of all U.S.-born workers were Hispanic.¹²

Most farmworkers speak Spanish as their primary language, with almost three-quarters unable to speak English proficiently or at all.¹³ Although estimates vary, more than half of farmworkers born outside the United States are thought to be undocumented.¹⁴ There is a lack of data on the exact statistic of undocumented farmworkers, including the number of workers, work conditions, work-related injuries and deaths, and healthcare, because undocumented workers may be reluctant to share information out of fear of the threat of deportation, family separation, and employer retaliation.¹⁵

B. Labor Conditions

Although mechanization has reduced how much farm labor is needed for grain production, intensive manual labor remains vital for the production and harvesting of berries, fruit, dairy, tree crops, vegetables, and management of livestock.¹⁶ Agricultural work of this kind requires a great deal of skill and endurance, and exposure to risks are inherent to this type of labor. Most farmworkers work well over forty hours a week, often staying on site to continue work in the fields early the next morning before sunrise.¹⁷ But this work is severely undervalued. Farmworkers earn an

10. *Id.*

11. Lena Brook & Juanita Constible, *Treat Farmworkers as Essential Not Sacrificial*, NAT. RES. DEF. COUNCIL (Sept. 14, 2020), <https://www.nrdc.org/experts/lena-brook/treat-farm-workers-essential-not-sacrificial>; see also, Trish Hernandez & Susan Gabbard, *Findings from the National Agricultural Workers Survey 2015-2016: A Demographic and Employment Profile of United States Farmworkers Research Report No. 13*, JBS INT'L (Jan. 2018), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/NAWS-Research-Report-13.pdf> [hereinafter *NAWS*] (“nearly three quarters categorized their race with an open-ended “other” response (73%)”).

12. *Id.*

13. *Id.*

14. *Farm Labor*, U.S. DEP'T OF AGRIC. ECON. RESCH. SERV. (Mar. 15, 2022), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/>; see also *Immigration Farmworkers and America's Food Production: 5 Things to Know*, FWD.US (Mar. 18, 2021), <https://www.fwd.us/news/immigrant-farmworkers-and-americas-food-production-5-things-to-know/>; see also Ferguson, *supra* note 9, at 3.

15. Ferguson, *supra* note 9, at 3.

16. *Id.* at 2.

17. *NAWS*, *supra* note 11, at 22–23.

average of \$10.60 per hour¹⁸ and only 14 percent of farmworkers reported a personal annual income of \$30,000 or more; the mean and median personal incomes were between \$17,500 to \$19,000.¹⁹ Despite rises in wages for this line of work in states like California, there remains a farm labor shortage, as most Americans do not want to apply for these positions.²⁰ This explains why most farmworker positions are taken by migrant workers, many working under the H-2A Temporary Agricultural Program, a program that allows temporary immigrant workers to fill agricultural positions for the short term.²¹

The type of labor farmworkers undergo is inherently dangerous. Coupled with economic hardship, undocumented status, and linguistic and cultural barriers, this leaves most farmworkers particularly vulnerable to what is already a dangerous profession, and climate change will only exacerbate those risks.

1. Pesticide Exposure

Because farmers heavily rely on pesticides for crop protection, farmworkers are often exposed to pesticides, resulting in immediate and long-term harm.²² Thousands of farmworkers suffer from acute pesticide poisoning every year and are twice as likely to suffer from severe injury or death from pesticide poisonings than workers in any other occupation.²³ The causes behind this phenomenon are numerous. Inadequate notices that the fields have been sprayed, (usually posted in English only), failure to enforce “no entry” periods after spraying, and allowing farmworkers back onto the fields prematurely, results in farmworkers risking injury and death through pesticide exposure.²⁴ Lack of adequate protective gear and

18. *Id.* at 23.

19. *Id.* at 36.

20. FWD.US, *supra* note 14; *see also Survey: California Farms Face Continuing Employee Shortages*, CAL. FARM BUREAU (Apr. 30, 2019), <https://fruitgrowersnews.com/news/survey-california-farms-face-continuing-employee-shortages/>; Natalie Kitroeff & Geoffrey Mohan, *Wages Rise on California Farms. Americans Still Don't Want the Job.*, L. A. TIMES (Mar. 17, 2017), <https://www.latimes.com/projects/la-fi-farms-immigration/>.

21. *H-2A Temporary Agricultural Labor Certification Program – Selected Statistics, FY 2018*, U.S. DEP'T OF LABOR (Sept. 30, 2018), https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2018/H-2A_Selected_Statistics_FY2018_Q4.pdf.

22. *See* Wasim Aktar et al., *Impact of Pesticides Use in Agriculture: Their Benefits and Hazards*, INTERDISC. TOXICOLOGY (Mar. 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2984095/>.

23. Ferguson, *supra* note 9, at 3–4.

24. *Id.* at 4; *see Analyze Trends: EPA/State Pesticide Dashboard*, EPA (Mar. 18, 2022), <https://echo.epa.gov/trends/comparative-maps-dashboards/state-pest-dashboard?state=National>.

training also contribute to pesticide exposure.²⁵ Between 2015–16, only fifty-seven percent of farmworkers had received any pesticide safety training in the previous twelve months.²⁶ Moreover, pesticides also hurt farmworkers' families who often live near the fields because pesticides can “drift” into family homes and farmworkers can bring home toxins on their clothes and bodies.²⁷ The resulting health issues linked to pesticide exposure are numerous: reproductive issues, birth defects, Alzheimer's disease, diabetes, cancer, memory loss, and potentially Autism.²⁸ At its worst, there are approximately 11,000 annual deaths worldwide caused by pesticide poisoning.²⁹

Pesticides will likely increase in use due to climate change and research indicates that the effects of pesticides on human health will worsen with rising temperatures and record-breaking summer peaks. Because climate change will bring about the expanding ranges and impacts of pests and pathogens and increase the resilience of weeds as compared to crops, pesticide efficacy is bound to decrease under increasing temperatures.³⁰ Higher temperatures also increase the volatilization rates of pesticides, which results in an increase of pesticides lost through water evaporation, increasing higher airborne concentration of pesticides and increasing exposure for farmworkers and nearby communities.³¹ Increased pesticide use from rising temperatures will undoubtedly increase bodily injuries and deaths associated with pesticides, but they are not the only threat. With increasing pesticide use, farmworkers will also have to wear more protective clothing making them more prone to heat related stress and injuries. A growing body of research has indicated that increased heat stress raises the human body's susceptibility to pesticides and other toxins, escalating acute and long-term health issues.³² Moreover, warmer temperatures have been shown to

25. Ferguson, *supra* note 9, at 4.

26. NAWS, *supra* note 11, at 60.

27. NAT'L FARM WORKER MINISTRY, *supra* note 4; *Agricultural Safety*, NAT'L INST. FOR OCCUPATIONAL SAFETY AND HEALTH (Sept. 21, 2021), <https://www.cdc.gov/niosh/topics/ag-injury/default.html>.

28. *Id.*; *CDC-Backed Study Suggests Possible Link Between Autistic Disorders, Maternal Pesticide Exposure in California*, NEUROLOGY TODAY, Sept. 4, 2007, https://journals.lww.com/neurotodayonline/Fulltext/2007/09040/CDC_Backed_Study_Suggests_Possible_Link_Between.5.aspx.

29. Wolfgang Boedeker et al., *The Global Distribution of Acute Unintentional Pesticide Poisoning: Estimations Based on a Systematic Review*, BMC PUB. HEALTH, Dec. 7, 2020, at 8.

30. Ferguson, *supra* note 9, at 5.

31. Ilse Delcour et al., *Literature Review: Impact of Climate Change on Pesticide Use*, 68 FOOD RESCH. INT'L 7–15, 12 (2015).

32. Ferguson, *supra* note 9, at 6.

increase the rate of chemical transformation into more toxic compounds.³³ Rising temperatures from climate change will not only bring about more toxic and more frequent pesticide use—it will raise farmworkers' susceptibility to risks and injuries associated with pesticide exposure.

2. Heat Stress and Wildfires

Between 1992 and 2017, heat was estimated to be responsible for an average 2,700 serious injuries and thirty deaths among U.S. workers per year.³⁴ Farmworkers die of heat-related causes at twenty times the rate of workers in all other civilian occupations.³⁵ This is mostly because of the nature of the work: prolonged exposure to direct sunlight throughout the hottest days of the year. Moreover, the type of pay may incentivize workers, especially those who have not yet been acclimatized to the weather conditions, to work through breaks, causing exhaustion.³⁶ For example, “piece” pay compensates workers by the amount of crop they bring in.³⁷ When wearing layers of pesticide clothing protection, workers may feel hotter than what the temperature actually is without such heavy clothing.³⁸ The heat conditions are not exclusive to field work as the housing provided by employers often does not have air conditioning and sometimes lacks windows for ventilation.³⁹

Climate change has exacerbated heat conditions as record breaking temperatures continue to climb during the summer months, seemingly always topping the year before. With that, increases in reports of heat-related deaths and heat strokes show a pattern in the lack of heat protection for farmworkers.⁴⁰ The expanding duration of drought seasons and high temperatures have caused wildfires to become much more common and much more dangerous. California, the largest producer of agricultural

33. *Id.*; see generally Don Mackay et al., *Fate in the Environment and Long Range Atmospheric Transport of the Organophosphorus Insecticide, Chlorpyrifos and Its Oxon*, 231 REVS. OF ENV'T CONTAMINATION AND TOXICOLOGY 35–76 (2014).

34. Ferguson, *supra* note 9, at 4.

35. *Heat-Related Deaths Among Crop Workers—United States, 1992–2006*, 57 MORBIDITY & MORTALITY WKLY. REP. 649–53, CDC (June 20, 2008), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm>.

36. Ferguson, *supra* note 9, at 4.

37. *Id.*

38. *Id.*

39. *Id.* at 5; see also Sirtori-Cortina, *supra* note 8.

40. See Sirtori-Cortina, *supra* note 8.

products,⁴¹ has had four of its worst fires on record between October 2017 and November 2018 alone and continues to have longer and longer fire seasons.⁴² The ferocity and size of wildfires, such as the 2018 Thomas Fires, which scorched 500 square miles in Santa Barbara, causes unhealthy air quality for weeks, which in turn means farmworkers often endure the smoke and suffer from smoke-related illnesses.⁴³ This trend may only get worse as scientists have estimated that fires may increase by up to twenty-five percent in the coming decades, making farmworkers' health sacrificial for the sake of agricultural production.⁴⁴

3. COVID-19 and Healthcare

The impacts of pesticides, heat-stress, and healthcare are compounded in the context of a pandemic and lack of healthcare. Throughout the pandemic, farmworkers have been disproportionately at high risk of COVID-19 exposure due to crowded housing, inability to quarantine, and lack of access to testing.⁴⁵ Not only do Hispanic populations experience disproportionately high rates of positive COVID-19 cases and mortality rates,⁴⁶ but agricultural workers are more likely to test positive than the general population.⁴⁷ In Monterey County, during the height of the pandemic in 2020, agricultural workers were more than three times more likely to be infected with COVID-19 than persons employed in other industries.⁴⁸

41. *Agricultural Production and Prices*, ECON. RESCH. SERV., USDA (last updated Jan. 4, 2021), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/agricultural-production-and-prices/#>.

42. *Climate Change and Health in California*, NAT. RES. DEF. COUNCIL (Feb. 2019), <https://www.nrdc.org/sites/default/files/climate-change-health-impacts-california-ib.pdf>.

43. See Borunda, *supra* note 1.

44. *Id.*

45. *Id.*

46. Rebecca K. Fielding-Miller et al., *Social Determinants of COVID-19 Mortality at the County Level*, PLOS ONE, Oct. 2020; McKaylee M. Robertson et al., *Racial/Ethnic Disparities in Exposure to COVID-19, Susceptibility to COVID-19 and Access to Health Care – Findings from a U.S. National Cohort*, EMERG INFECT DIS., Jan. 12, 2022, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8764735/>.

47. *COVID-19 Impact on Agricultural Workers*, NAT'L CTR. FOR FARMWORKER HEALTH, INC. (last updated May 2022), <http://www.ncfh.org/uploads/3/8/6/8/38685499/covid-19factsheety2q1.pdf>.

48. Don Villarejo, *Increased Risks and Fewer Jobs: Evidence of California Farmworker Vulnerability During the COVID-19 Pandemic*, CAL. INST. FOR RURAL STUD. (July 25, 2020), <https://californiainstituteofruralstudies.wpcomstaging.com/wp-content/uploads/2021/06/Increased-Risks-and-Fewer-Jobs-Evidence-of-California-Farmworker-Vulnerability-During-the-COVID-19-Pandemic-Full-Report.pdf>.

Moreover, farmworkers who are at risk of being infected with COVID-19 lack access to healthcare due to lack of transportation to healthcare facilities from remote rural areas where they often live and work.⁴⁹ Eligibility is another issue that faces undocumented workers, since their immigration status can prevent them from accessing health care and fear of retaliation may exacerbate the issue by preventing workers from looking into alternatives.⁵⁰ Perhaps most troubling is when one considers the compounding effects of COVID-19 with the health issues caused by pesticides and smoke, often associated with respiratory distress syndrome.⁵¹ Whether it is COVID-19, pesticide exposure, heat-stress, or wildfires, the injuries and complications that may result from these conditions are not met with adequate access to healthcare, leaving agricultural workers in a particularly vulnerable position. The severity of these impacts will only grow worse as climate change continues to significantly amplify their risk.

III. LEGAL PROTECTIONS FOR AGRICULTURAL WORKERS

Agricultural workers have historically been excluded by federal laws meant to protect workers from unsafe work conditions and ensure labor rights. Subsequently, unionizing became a vital method to ensure the rights and safety of workers in the fields, marking the success of the farmworker movement of the 1960s.⁵² Despite overcoming many of the obstacles towards unionization, legal and social barriers towards access to unions and fair labor practices persist.

A. *National Labor Relations Act*

The National Labor Relations Act (NLRA) was passed in 1935 and serves to protect employees who engage in collective bargaining with employers for a certain standard of work conditions, fairer wages, and other conditions and benefits of employment.⁵³ The NLRA is designed to ensure an employee's right to unionize and collectively bargain without the fear of retaliation from their employer. However, the NLRA excludes agricultural workers from its scope of protection because they are not

49. *Health & Safety*, NAT'L FARM WORKERS MINISTRY (last updated Jan. 2021), <https://nfwm.org/farm-workers/farm-worker-issues/health-safety/#hours>.

50. *Id.*

51. NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 47.

52. Luke Perez, *Essential and Expendable: The Rise of Agricultural Labor and the United Farm Workers*, NAT'L MUSEUM OF AM. HIST. (Oct. 15, 2020), <https://americanhistory.si.edu/blog/essential-and-expendable>.

53. 29 U.S.C. § 151 (1947).

included in its definition of “employee.”⁵⁴ Thus, employers face no consequences for failing to recognize the union.⁵⁵ While farmworkers are able to unionize, they do not have a protected right to unionize and engage in collective bargaining, which inevitably deters organizing due to fear of retaliation from their employer. There is great debate on who is considered a protected “employee” versus an unprotected “agricultural worker,” but case law and policy shows a trend in attributing “agricultural worker,” (who are regarded as outside the category of “employee” under § 2(3) of the NLRA and follows the Fair Labor Standards Act’s section 3(f) definition of “agricultural worker”), to those who take jobs that are normally taken by disenfranchised farmworkers.⁵⁶ These jobs include positions with heavy manual labor and risky processing positions.⁵⁷ The incentive to unionize without protection narrows even further when the workers do not speak English, speak English poorly, have little to no alternatives for employment, live in poverty, and/or are undocumented.⁵⁸

Because the term “agricultural workers” is not clearly defined under the NLRA, Supreme Court case law has helped define what jobs fit under it. In *Bayside Enterprises, Inc. v. National Labor Relations Board*, the Supreme Court found that transportation employees who drove live poultry from the mill to broiler farms were not agricultural employees and thus could not be excluded from the NLRA, upholding the National Labor Relations Board’s (NLRB) decision.⁵⁹ In a strikingly similar case, poultry transporters not only drove the live chickens to the slaughterhouse but handled them, rather than simply delivering them like the workers in *Bayside*.⁶⁰ Writing the majority opinion, Justice Ginsburg clarified that §3(f) requires that an agricultural worker’s type of work that which is performed on a farm, rather than work incidental to farm work.⁶¹

The rationale behind excluding agricultural labor from employee status under the National Labor Relations Act is from a time and age where many farms still operated as family farms, intending to protect

54. 29 U.S.C. § 152(3).

55. 29 U.S.C. § 158 (1974).

56. See John A. Bourdeau, *Who Are “Agricultural Laborers” Exempt from Coverage of National Labor Relations Act § 2(3) (29 U.S.C.A. § 152(3))*, 130 A.L.R. FED. 1 (last visited Nov. 15, 2022).

57. *Id.*

58. Michael H. LeRoy & Wallace Hendricks, *Should “Agricultural Laborers” Continue To Be Excluded From The National Labor Regulations Act?*, 48 EMORY L.J. 489, 491, 500 (1999).

59. 429 U.S. 298, 299, 304 (1977).

60. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 (1996).

61. *Id.* at 402.

them from regulation that would be burdensome to small families.⁶² However, today the small farm has become something of an anachronism, and the reality is that most agricultural production is operated and managed by large agricultural businesses.⁶³

B. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) is the primary federal law in establishing labor standards for interstate commerce industries, including a federal minimum wage, regulated overtime pay, recordkeeping requirements and limitations on child labor.⁶⁴ Farmworkers were excluded from the regulations under the FLSA until 1966, but even today, farm labor may be exempt from overtime pay depending on the size of the farm and person performing labor.⁶⁵ The type of labor that qualifies for exemption is commonly known as “3(f)” agricultural work.⁶⁶ Farms that qualify for this exemption of overtime are those that employ roughly seven employees employed full-time in a calendar quarter, (also known as the “500 man day limit”).⁶⁷ Moreover, and most importantly, the FLSA created a categorical exemption to the minimum wage for piece rate workers and their children.⁶⁸ These piece rate workers do not contribute to the overtime “500 man day limit.”⁶⁹

There are limitations to the Fair Labor Standards Act categorical exemption for minimum wage under §213(a)(6). First, piece rate must be customary to the area.⁷⁰ The worker must also live close by, commute to the farm, and have worked no more than thirteen weeks in the previous years.⁷¹ Lastly, they cannot perform any other tasks related to production, so they are limited to harvesting.⁷² However, it is not clear how well enforced these limitations are. For example, how is piece rate basis determined to be customary for a region? It is also unclear how these enforcements apply to undocumented workers who may, and often do, migrate across states for employment.⁷³ The Department of Labor has

62. LeRoy & Hendricks, *supra* note 58, at 491.

63. *Id.*

64. 29 U.S.C. § 201 et seq.

65. *See* 29 C.F.R. § 780.301(c).

66. 29 U.S.C. § 203(f).

67. 29 C.F.R. § 780.305.

68. 29 U.S.C. § 213(a)(6).

69. 29 C.F.R. §§ 780.310–18.

70. 29 U.S.C. § 213(a)(6).

71. *Id.*

72. *Id.*

73. LeRoy & Hendricks, *supra* note 58, at 491.

noted that farm businesses tend to lack adequate record keeping, as required under the FLSA, particularly with information regarding temporary agricultural employees' permanent addresses and the number of hours they worked under piece rate labor.⁷⁴

Perhaps the most egregious issue is the Fair Labor Standard Act's allowance of child labor in agriculture. There are estimated to be between 500,000–800,000 farmworkers under the age of eighteen.⁷⁵ Children can start working at the age of sixteen and in agriculture, the minimum age of sixteen is the standard for children working during school hours, even when the work may be declared too hazardous to work by the Secretary of Labor.⁷⁶ Children below sixteen can still work in positions deemed too hazardous by the Secretary for workers their age so long as they are under the employment of their parent or guardian.⁷⁷ Children as young as fourteen years old are exempt from child labor laws if they work on the farm outside school hours.⁷⁸ From as early as age twelve, minors can perform work with the consent of their parents, or if on a farm operated by their parent or guardian or anyone standing in for their parent or guardian.⁷⁹ Undocumented migrant children are generally not covered by the FLSA, especially in cases where the child is considered the employee of their parent who regards themselves as a contractor to circumvent requirements under FLSA.⁸⁰

The repercussions of allowing exemptions from child labor laws in one of the most dangerous environments have been felt across the industry: one study showed one in every five farm deaths being a child under the age of sixteen.⁸¹ In fact, children in agriculture made up forty-two percent of all work-related deaths of minors between 1992 and 2000; half of these victims being fourteen years old or younger.⁸² The Government Accountability Office has estimated that more than 100,000

74. Robert Branan, *Fair Labor Standards Act in Agriculture*, N.C. EXTENSION, https://farmlaw.ces.ncsu.edu/agribusiness-law/labor-and-employment/fair-labor-standards-act/#_ednref46 (last visited Apr. 2, 2022).

75. Benjamin Hess, *Children in the Fields: An American Problem*, ASS'N OF FARMWORKER OPPORTUNITY PROGRAMS 6 (2007), <http://afop.org/wp-content/uploads/2010/07/Children-in-the-Fields-Report-2007.pdf>.

76. 29 U.S.C. § 213 (c)(2); 29 C.F.R. § 570.2(a)(1), (b).

77. 29 U.S.C. § 213 (c)(2).

78. 29 U.S.C. § 213(c)(1)(C).

79. 29 U.S.C. § 213(c)(1)(A)–(B); 29 C.F.R. § 570.2(b).

80. Michael A. Pignatella, *The Recurring Nightmare of Child Labor Abuse—Causes and Solutions for the 90s*, 15 B.C. THIRD WORLD L.J. 171, 196–97 (1995).

81. *Id.* at 196.

82. Hess, *supra* note 75, at 7.

children and adolescents are injured on farms annually.⁸³ Children are especially vulnerable to the effects of prolonged manual labor, given they are still developing physically, contributing to musculoskeletal injuries such as tendonitis and carpal tunnel syndrome.⁸⁴ Not only does exposure to pesticides at an early age create life-long health issues, but children are disproportionately exposed to pesticides compared to adults due to their greater intake of water, food, and air relative to their body size and weight.⁸⁵ Moreover, children and adolescents who work through the poor air quality during wildfires are more likely to be acutely affected in their respiratory health than adults.⁸⁶

C. *The Migrant and Seasonal Agricultural Worker Protection Act*

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) is the principal federal labor law concerning farmworkers. Employees working under the H-2A program are subject to the regulation of the Immigration and Nationality Act, which regulates housing, transportation, and contractual guarantees of employment for H-2A workers.⁸⁷ Farm labor not covered or regulated under the H-2A program is subject to MSPA.⁸⁸ Seasonal workers, as defined by the MSPA, are not limited to workers born outside the country, although a large percentage are.⁸⁹ The primary legal protections of the MSPA are informational—it requires employers to provide employees with information about the place of employment, wages paid, duration of employment, farm labor to be paid, and whether worker’s compensation is provided.⁹⁰ One prohibitive rule under MSPA prevents employers from withholding wages.⁹¹ Enforcement is carried out by the Department of Labor but MSPA can be used as a private right of action against employers. One study found that investigated violations of MSPA resulted in \$1.3 million paid back in wages to 2,300 employees.⁹²

83. *Id.*

84. *Id.* at 14.

85. *Id.* at 8.

86. Rebecca Sohn, *Wildfire Smoke is Particularly Harmful to Kids’ Respiratory Health, Study Finds*, STAT (Mar. 23, 2021), <https://www.statnews.com/2021/03/23/wildfire-smoke-is-particularly-harmful-to-kids-respiratory-health-study-finds/>.

87. 8 U.S.C. § 1188.

88. 29 U.S.C.A. §§ 1801–1872.

89. 29 U.S.C.A. § 1802(8).

90. 29 U.S.C. § 1831(a)(1).

91. 29 U.S.C § 1832(a).

92. Martin D. Costa et al., *Fair Labor Standards Enforcement in Agriculture*, ECON. POL’Y INST. (Dec. 15, 2020).

D. Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHA) regulates workplace environments to ensure safe working conditions. With regard to farms, OSHA regulates temporary labor camps,⁹³ tractor-roll over protection,⁹⁴ and farm equipment and machinery.⁹⁵ Farmers are responsible for ensuring compliance with sanitary guidelines in the field,⁹⁶ as well safety signage, storage of hazardous chemicals, logging operations, and cadmium use.⁹⁷ OSHA also provides exemptions from these regulations for employees who are immediate family members and small farms consisting of ten or fewer people.⁹⁸ Alarming, inspections are not permitted on small farms, even when there are employee complaints about conditions.⁹⁹

OSHA has largely failed to adequately protect farmworkers from agricultural labor hazards. For example, heat-stress regulation for farmworkers is not covered under federal regulations, which OSHA claims is unnecessary given the General Duty Clause.¹⁰⁰ This clause imposes a generalized duty on the employer to provide a work environment free from recognized hazards likely to cause injury or death. But the lack of adequate protection and enforcement from this overly broad duty is blatant: on average, OSHA cites twenty-eight heat-related citations per year, whereas the Bureau of Labor Statistics attributes an average of thirty-seven deaths and thousands of worker injuries every year to heat stress.¹⁰¹ Even California's stronger Cal/OSHA regulations, the strongest OSHA regulations in the country, fail to adequately protect farmworkers whose work rate in high temperatures make them especially susceptible to heat-related illnesses.¹⁰² Even when state-adopted OSHA regulations are intended to protect farmworkers from wildfire smoke,

93. 29 C.F.R. § 1910.142.

94. 29 C.F.R. § 1910.142.

95. 29 C.F.R. § 1910.57.

96. 29 C.F.R. § 1910.110.

97. 29 C.F.R. §§ 1910.111(a)–(b), 1910.266, 1910.1200.

98. Branan, *supra* note 74.

99. *Id.*; Douglas L. Parker, U.S. Dep't of Labor, Memorandum on OSHA Instruction CPL 02-00-051, Enforcement Exceptions and Limitations under the Appropriations Act (Mar. 9, 2022).

100. Kelly Kramer, *Climate Change is Worsening Extreme Heat: Is OSHA Doing Enough to Protect Farm Workers?*, INST. FOR AGRIC. & TRADE POL'Y (Oct. 11, 2018), <https://www.iatp.org/blog/osha-doing-enough-protect-farm-workers>.

101. *Id.*

102. Chelsea Eastman Langer et al., *Are Cal/OSHA Regulations Protecting Farmworkers in California From Heat-Related Illness?*, 63 J. OF OCCUPATIONAL AND ENV'T MED. 532 (June 2021).

employers who often fail to provide required N-95 masks or fail to move them indoors at a certain air quality index threshold are rarely penalized.¹⁰³ It is no surprise that the OSH Administration is unable to adequately protect farmworkers, as critics of the agency attribute its failure to protect workers across various industries to its lack of resources, pointing out that, at its current staffing, it would take 117 years to inspect workplaces that fall under its jurisdiction.¹⁰⁴

E. Unionizing

Current federal regulations are insufficient to protect farmworkers. This explains why union and union access has become the sole option for vulnerable farmworkers, even though no federal law exists creating a farmworker right to unionize. This leaves farmworkers at the mercy of state laws for the guarantees of their safety and health in the workplace. While some states like California have passed comprehensive union rights laws for agricultural laborers, other states, like Arizona, have passed laws that favor employers in collective bargaining regulations.¹⁰⁵ Even those states that pass unionizing laws in favor of agricultural workers have trouble regulating and enforcing them.¹⁰⁶

Despite the low number of farmworkers in unions, farmworkers have successfully been able to unionize, especially in states like California that have in place laws that protect a farmworker's access to unions. But even as the country strengthens its union laws through piecemeal state legislation, constitutional issues produce another obstacle to farmworkers' path to fair labor conditions.

IV. THE NEW OBSTACLE OF ACCESS TO UNIONS: *CEDAR POINT NURSERY V. HASSID*

A. Cedar Point Nursery v. Hassid

The California Agricultural Labor Act of 1975 gave California farmworkers a right to unionize and prohibits employer interference with

103. Farida Jhabvala Romero, *California Failed to Protect Outdoor Workers from Wildfire Smoke Under Biden's New OSHA Chief*, KQED (Dec. 2, 2021), <https://www.kqed.org/news/11897789/california-largely-failed-to-enforce-worker-smoke-protections-under-bidens-new-osha-pick>.

104. Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 NYU J. LEGIS. & PUB. POL'Y 555, 564 (2007).

105. LeRoy & Hendricks, *supra* note 58, at 495.

106. *Id.*

that right.¹⁰⁷ To realize unionization, union leaders would have to access the fields owned by the employer to meet and talk with farmworkers, given the lack of “channels” of communication available within the agricultural industry, particularly for farmworkers.¹⁰⁸ Given the difficulties in contacting farmworkers, California’s law allowed union organizers to access an agricultural employer’s property for up to four 30-day periods in one calendar year, so long as they do not disrupt the farmworkers from their work or engage in disruptive conduct.¹⁰⁹ The law specifically would allow them to enter for up to one hour before work, one hour at lunch, and one hour after work.¹¹⁰ The law provided that in order to access the property, the union must provide notice to the employer, but after that requirement, the employer cannot prevent the union organizers from entering the property without committing unfair labor practices under state law.¹¹¹

A dispute between farmers at Cedar Point Nursery (Cedar) and Fowler Packing (Fowler) and the United Farm Workers (UFW) arose when UFW disrupted farm operations at Cedar’s fields, entering without giving prior notice due to alleged ongoing unfair farming practices and attempted to enter Fowler’s property but were blocked by the company.¹¹² The farmers filed suit in district court, arguing that California’s property access regulation was a constitutional violation under the Fifth and Fourth Amendments because it was a *per se* taking by the government without just compensation.¹¹³ The district court rejected the farmers’ arguments, distinguishing *per se* takings from regulatory takings, finding this case was subject to a regulatory takings analysis and required a balancing test analysis as promulgated under *Penn Central Transportation Co. v. New York City*.¹¹⁴ The Ninth Circuit affirmed, clarifying that certain regulatory actions, such as permanent physical invasions and regulations depriving the owner of all economically beneficial use are *per se* takings, but that

107. CAL. LAB. CODE §§ 1152, 1153(a) (West 2020).

108. CAL. CODE REGS. tit. 8, § 20900 (c) (2021) (stating that “[g]enerally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor.”).

109. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).

110. *Id.*

111. *Id.*

112. *Id.* at 2069–70.

113. *Id.* at 2070.

114. *Id.* (citing Cedar Point Nursery v. Gould, 2016 WL 3549408 1, 4 (E.D. Cal. June 29, 2016)).

regulations sitting outside of these situations are subject to a *Penn Central* analysis.¹¹⁵

The Supreme Court reversed the Ninth Circuit, holding that the California access regulation constituted a *per se* taking and required just compensation.¹¹⁶ The Court reasoned that a taking does not have to be permanent to constitute a *per se* taking.¹¹⁷ The majority listed past decisions where just compensation was due even when the taking was temporary.¹¹⁸ The majority further recognized that while not every physical invasion is a taking, the physical appropriation of a right to invade a property may constitute a taking regardless of the fact that it is not permanent.¹¹⁹ Following from this, intermittent physical invasions can constitute takings.¹²⁰ The Court explained that the duration and frequency of the invasion, like the size of the appropriation, only informs the amount to be compensated, not whether it is a taking.¹²¹ The Court further clarified that, although constitutionally protected property rights are creatures of state law, a taking can still occur even if the appropriation is not formalized with a recorded fee simple or has right of transfer.¹²² Lastly, the Court distinguished between government activities that involve entry into property versus *per se* takings. First, isolated physical invasions are acts of trespass, subject to torts, not property law, because they declare no granted right of access.¹²³ Second, most government physical invasions do not amount to takings because they fall in line with long-standing restrictions of property rights, such as the restriction to abate nuisance, allowing access to property for public or private necessity like in criminal law or emergency scenarios.¹²⁴ Third, the government may require owners to cede a right of access as a condition to receiving a benefit.¹²⁵ Permits, licenses, or registrations are granted on the condition that the government will be allowed access for reasonable safety and health

115. *Id.* (citing *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 530–31, 534 (9th Cir. 2019)).

116. *Id.* at 2080.

117. *Id.* at 2074.

118. *Id.*

119. *Id.* at 2074–75 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987)).

120. *Id.* at 2075.

121. *Id.*

122. *Id.* at 2076.

123. *Id.* at 2078.

124. *Id.* at 2079.

125. *Id.*

inspections.¹²⁶ Here, the Court concluded that the regulation amounts to more than a trespass where there is no traditional property principle allowing union access, and the regulation provides no benefit to the owner nor poses any public risk.¹²⁷

Justice Breyer, joined by Justice Kagan and Justice Sotomayor, dissented. The dissent urged the Court to think of the problem as a nonpermanent right of access, as opposed to an appropriation, and questioned the majority's understanding of what an appropriation is.¹²⁸ The dissent distinguished between the meaning of an appropriation and a regulation that grants access, not amounting to any traditional property interest in the land.¹²⁹ Here, there was a right to exclude being temporarily limited.¹³⁰ Most notably, the dissent questioned the adequacy of exceptions the majority drew for government actions not amounting to physical takings. Justice Breyer pointed out that the majority left unclear the difference between an "isolated invasion" and a temporary invasion, which calls for a *Penn Central* analysis.¹³¹ Moreover, the second exception leaves a narrow, antiquated group of privileges for access to property, not accounting for the public and private necessities of the modern day, such as farmworker safety.¹³² Lastly, the majority did not parse out what constitutes a benefit in its third exception, and it was clear that a regulation that ensures the health and safety of an employer's workers and ensures labor peace is a benefit to that employer, regardless of whether they might deny that.¹³³

B. *Analysis and Implications*

The narrow list of exceptions left by *Cedar Point* will not be sustainable for labor industry rules regarding access to property.¹³⁴ Because these categories are so narrow and ambiguous, many governmental actions will be called into question as to whether they are beneficial to the property owner or whether they fall within the scope of traditional property privileges, such as meat inspections. To repeat Justice

126. *Id.*

127. *Id.* at 2080.

128. *Id.* at 2081–83 (Breyer, J., dissenting).

129. *Id.* at 2082 (Breyer, J., dissenting).

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

131. *Id.* at 2088 (Breyer, J., dissenting).

132. *Id.* at 2088–89 (Breyer, J., dissenting).

133. *Id.* at 2089 (Breyer, J., dissenting).

134. Michael J. Hayes, *Points About Cedar Point: What Labor Access Survives, and What Should Survive (Or Be Restored)*, 39 HOFSTRA L. EMP. L.J. 73, 83 (2021).

Breyer’s point: What benefit does a statute give an employer for government access to a wetland habitat for a survey? This narrow classification will not only generate unnecessary litigation, but it will disrupt existing laws and policies that regulate the vast production of goods for the public.¹³⁵

Cedar Point perpetuates a vicious cycle of isolation for farmworkers. Because farmworkers lack labor rights and are in such low socioeconomic status, they are hard to reach. Their hours are long and location of work hard to access; they are often undocumented, fear retaliation in seeking help, do not speak English, and might have little to no access to internet or transportation outside their work and residence. In some instances, they are intimidated by violence and the presence of armed guards.¹³⁶ In many ways, farmworkers are virtually isolated from public access. If union organizers are unable to reach them, then they are unable to organize, and a state law ensuring the right to unionize is an empty husk. The California access regulation would remedy that by allowing a temporary right of access for the sole purpose of meeting and communicating with agricultural workers.¹³⁷ But *Cedar Point* expunges yet another possibility to organize for improving poor work conditions.

V. SOLUTIONS

This Part proposes a few solutions to overcome obstacles to ensuring farmworker’s labor rights. First, stronger federal laws are needed by rethinking exceptions to existing federal laws in the context of the twenty-first century and climate change. Second, union access should be interpreted and treated in the same way current government inspections are for public health and safety.

A. *Stronger Federal Laws*

Current federal laws regulating labor rights to unionize and protect workers exclude agricultural workers.¹³⁸ The rationale for the agricultural worker exception is somewhat outdated. Though originally intended to

135. *Id.*

136. Susan L. Marquis, *Saving Farmworkers from Slavery-Like Conditions, Field by Field*, THE RAND BLOG (Sept. 5, 2019), <https://www.rand.org/blog/2019/09/saving-farmworkers-from-slavery-like-conditions-field.html> (stating that farmworkers “are physically isolated in remote rural areas and socially isolated because most don’t speak the local language. Armed guards, threats of violence, visible beatings, sexual abuse and a culture of racism complete the trap of isolation and fear.”).

137. CAL. CODE REGS. tit. 8, § 20900(c) (2021).

138. 29 U.S.C. § 152(3) (2018); 29 C.F.R. § 780.301(c) (2022).

exclude small family farms from burdensome regulation meant for large agricultural companies,¹³⁹ small farms today are declining rapidly.¹⁴⁰ Presently, the corporate farm exploits and abuses the occupations Congress thought should be excluded for their own benefit in 1935. Inversely, the modern farmworker is exactly the type of employee that the National Labor Relations Act and Fair Labor Standards Act originally intended to protect from exploitation.¹⁴¹ Moreover, today's farms are met with demands for greater food production,¹⁴² which creates further incentive to use cheap labor at the cost of the health of the workers, or to entirely circumvent regulations with undocumented workers.

With the advent of modern pesticides and climate change compounding their effects and increasing the frequency of wildfires in the nation's top agricultural states, legislation meant to protect workers from the dangers of the industry almost one hundred years ago needs to be updated. This means that federal regulations like the Occupational Safety and Health Act need to add further explicit protections from conditions like heat-related stress¹⁴³ and push for frequent inspections, (including small farms that may still exploit unrelated workers), and stronger enforcement, including larger penalties for violations. Given the shocking statistics of child deaths and injuries in agriculture,¹⁴⁴ the FLSA should categorically exclude children from its exemptions for agricultural work.

A piecemeal solution to a national issue through state legislation is better than nothing, but lack of uniformity through the absence of federal regulation creates conflicting state laws.¹⁴⁵ Moreover, a lack of uniformity in the agricultural sector is inconsistent with the NLRA's treatment of most other private-sector employees, with its justification for this disparity taking seat in the ideal of the small family farm from an era long gone.¹⁴⁶

139. LeRoy & Hendricks, *supra* note 58, at 505.

140. *Id.* at 503; Alana Semuels, 'They're Trying to Wipe Us Off the Map.' *Small American Farmers Are Nearing Extinction*, TIME (Nov. 27, 2019), <https://time.com/5736789/small-american-farmers-debt-crisis-extinction/>.

141. LeRoy & Hendricks, *supra* note 58, at 506.

142. David Tilman et al., *Global Food Demand and the Sustainable Intensification of Agriculture*, PNAS, Dec. 13, 2011, at 1 (noting that "[g]lobal demand for agricultural crops is increasing, and may continue to do so for decades.").

143. Kramer, *supra* note 100.

144. Hess, *supra* note 75, at 7.

145. LeRoy & Hendricks, *supra* note 58, at 492, n. 18.

146. *Id.* at 493.

B. *Treat Union Access Similar to Government Health and Safety Inspections*

Cedar Point draws a muddy distinction between those government-authorized physical takings grounded in “longstanding background” privileges to access property and those that are not.¹⁴⁷ While this leaves other government activities that regulate industries through access to property in a precarious state, it is likely that lower courts will attempt to save, (at least some), of those activities through clear delineations, even if those activities are relatively newer than the examples the Supreme Court articulated in *Cedar Point*. The policy reasons for poultry or egg processing plants being inspected are obvious: the safety and welfare of the public. It would be odd to eradicate them because they may not fall exactly within the scope of what is a longstanding background privilege. This brings up a further point: How far back does a traditional privileged right of access activity have to go? An argument can be made that union access privileges have been largely unsuccessfully challenged for enough time to constitute a traditional privilege in temporary access to property.¹⁴⁸

Breyer’s point about the benefits of labor union access cannot be emphasized enough.¹⁴⁹ Union access *does* provide a benefit to the employer: happy, healthy, and safe workers. The ability to collectively bargain about one’s rights can avoid employer penalties under other regulations or lawsuits. Moreover, the safety and health of farmworkers is a public health and safety concern because the dangers behind under-regulated labor conditions afflict thousands of people every day, including pregnant women and children. The benefit of protecting these workers cannot be understated, especially when Americans benefit tremendously from it every time they eat.

VI. CONCLUSION

In the strikes of the 1960s, during the farmworkers’ movement, a chant borrowed from a Southern gospel hymn could be heard: “No nos moveran.” Translating to “we shall not be moved,” it evoked a strong feeling of resistance and solidarity among a class of people that fought for

147. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

148. John D. Escheverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 767–68 (2020) (explaining that “there do not appear to be any reported cases addressing taking claims based on mandated access to private property under the NLRA, much less successful claims. Takings claims based on a similar access mandate under the California Agricultural Labor Relations Act have been repeatedly rejected.”).

149. *Cedar Point*, 141 S. Ct. at 2089 (Breyer, J., dissenting).

basic labor rights. Today that fight continues with even more emphasis because of climate change. This fight can continue from an environmental law perspective layered on a labor law lens. Leaving those most vulnerable to the effects of changing climate is an intersectional environmental justice issue that cannot be ignored. Such a fight will take reforming current federal labor laws and grouping the importance of union access alongside with that of other public health and safety issues where government-authorized access is generally allowed.