# Unlocking The Farmhouse Gate

## The California Case for Access Rights for Farmworkers Living in Employer-Provided Housing

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*Agricultural workers often live in housing their employers provide. These employers may block third parties from contacting workers in their employer-provided homes, including attorneys and other outreach workers. This Note reviews legal protection for outreach workers attempting to contact farmworkers at their homes, focusing on California. In many states, including California, neither statute nor caselaw explicitly guarantees the right of third parties to visit agricultural workers in their employer-provided homes. Courts in some states have addressed farmworker housing access rights directly. Some have found an access right based in First Amendment guarantees, while others have found that state constitutions, property law, or landlord-tenant law support access rights. The California Constitution, which provides more expansive protection of free speech and privacy rights than does the First Amendment, as well as landlord-tenant law and California public policy, compel robust protection for worker housing access rights in California. This note concludes with possible steps to assure vindication of this basic right.*



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## INTRODUCTION

At around five in the afternoon on a Wednesday, a legal aid outreach worker went looking for a bunkhouse in California where farmworkers were housed. The hour was promising: agricultural workers, who start the workday early, are generally not in the fields at five in the afternoon. And the location was good: by visiting the workers in their homes, the outreach worker would not disrupt the workday or infringe on the employer's control of the workplace. The outreach worker hoped to inform the workers of their legal rights, and brought with him flyers explaining some such rights, including the right not to be compelled to work to pay off a debt and the right not to have unlawful deductions subtracted from pay; the flyer also gave contact information for legal assistance and for three organizations fighting human trafficking.

The attempted visit ended badly. A ranch employee intercepted him, took a copy of the flyer, and sent him away. A few days later, the ranch's attorney sent a letter to the outreach worker's employer, asserting that "[u]nder Penal Code section 602, any person who willfully commits a trespass is guilty of a misdemeanor."[1] The letter threatened that if these "unacceptable and indisputable illegal antics" were repeated, ranch

1. California Penal Code section 602 enumerates misdemeanor trespass offenses, which include willfully "entering any lands . . . for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent, or the person in lawful possession"; "[e]ntering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are displayed . . . without the written permission of the owner of the land, the owner's agent, or the person in lawful possession" and "[r]efusing or failing to leave the lands immediately upon being requested by the owner of the land, the owner's agent, or by the person in lawful possession to leave the lands"; and "[e]ntering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession." Cal. Penal Code § 602 (k)-(m).

managers and supervisors were instructed "to conduct a lawful citizen's arrest under Penal Code section 837 and detain all trespassing agents . . . until the local authorities have arrived."[2] If the outreach worker had stood his ground, would ranch employees be within their rights to detain him, and would a court enforce a trespass charge?

Employer-provided housing is often the only place where outreach workers can hope to contact agricultural workers.[3] Employers must offer free housing to any workers they hire under the H-2A guest worker program. Most workers accept the free housing. H-2A employers must also hire U.S. residents who apply for H-2A positions, and these workers are also entitled to free housing. Employers may also provide housing to seasonal workers who are not part of the H-2A program. Many workers, particularly foreign workers, have no means of leaving the provided housing on their own initiative, and during their employment, they visit the outside world rarely, if at all.

Often, agricultural workers only learn about their legal rights through third parties who approach them at home. They may receive medical care or educational or religious services only when outreach workers come to their residences. Nonetheless, employers frequently block third parties' efforts to contact them.[4] Some employers may attempt to exclude outsiders from worker housing by posting *No Trespassing* signs or turning would-be visitors away.[5] Others may attempt to control their workers' contact with outsiders through contract terms that bar some visitors categorically from housing, that require workers to make written requests for permission to admit other guests, and that purport to give the employer the right to deny guest access for no reason.

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2. Letter to California Rural Legal Assistance (May 8, 2018) (on file with the author). According to public records, the H-2A employer on whose behalf the letter was sent was certified to hire 85 workers from April 2, 2018 to February 1, 2019. Letter from California Workforce Development Agency, Employment Development Department, State of California, to California Rural Legal Assistance (May 10, 2018) (on file with the author) (hereafter, Letter from California Workforce Development Agency).

3. *See* Reena K. Shah and Lauren E. Bartlett, *Human Rights in the United States: Legal Aid Alleges that Denying Access to Migrant Labor Camps is a Violation of the Human Right to Access Justice*, HUM. RTS. BRIEF 20.1 (2012), 15, 16 (establishing importance of housing access given comprehensive employer control of H-2A workers' lives).

4. The problem is widespread. Legal Aid Bureau, Inc., *Joint Legal Aid Complaint to UN Special Rapporteur on Migrant Camp Access*, Dec. 13, 2012, at 19-24 (https://perma.cc/GRT6-D39H) (hereafter, *UN Human Rights Complaint*). The UN Human Rights Complaint describes intimidation tactics, including through the use of local law enforcement, and routine denials of access to legal and health services providers, and includes copies of letters threatening service providers with prosecution for trespass. *Id. See also* Rivero v. Montgomery Cty., 259 F. Supp. 3d 334, 342 (2017) (holding that a pattern of law enforcement assistance in keeping Legal Aid workers from approaching farmworkers in their homes supported Legal Aid's standing to seek declaratory relief); Jason Yarashes, Legal Aid Justice Center, *Migrant Worker Labor Camp Access for Service Providers*, Oct. 1, 2018, at 3-4. (https://perma.cc/B7E7-WSQQ) (describing instances of access denial in Virginia).

5. *See* Shah and Bartlett, *supra* n.3, at 16 (detailing routine denial of access).

Courts in California, Colorado, Connecticut, Florida, Indiana, Maine, Maryland, Michigan, New Jersey, New York and Washington have all concluded that outreach personnel have a right to approach workers in employer-provided housing, whatever the employers claim.[6] They reach their conclusions by different reasoning and find an access right of differing breadth. Some find a guarantee of access in the First Amendment rights of canvassers to approach occupants, and of householders to receive (or reject) them. Some courts have extended these protections to camp operators through the state action doctrine articulated in *Marsh v. Alabama*, the 1946 Supreme Court case holding that Jehovah's Witnesses had a First Amendment right to canvass within the boundaries of a company town.[7] Some courts instead find that state constitutions, property law, and landlord-tenant law entitle workers to some or all of the rights of tenants, including the right to be approached in their homes by would-be visitors.

The California Supreme Court has not addressed the question directly. In 1974, the California Supreme Court endorsed the First Amendment reasoning of worker housing access cases from other jurisdictions.[8] Four years later, in *Pruneyard v. Robins*,[9] the California Court held that the California Constitution offers broader free speech rights than does the U.S. Constitution, and held that in some circumstances, private property rights must yield to public interest to protect this right.[10] The California

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6. *See* People v. Medrano, 78 Cal. App. 3d 198, 213-14 (1978) (California labor organizers at independent farmworker housing) (*rev'd on other grounds*); *Rivero*, 259 F. Supp. 3d at 355-56 (Maryland legal aid workers); State v. DeCoster, 654 A.2d 891, 894 (Me. 1995) (Maine legal aid attorney and health educator); Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 437 F. Supp. 60, 61-62 (S.D. N.Y. 1977) (New York legal aid outreach worker); Asociación de Trabajadores Agrícolas de P.R. v. Green Giant Co., 518 F.2d 130, 137 (3d Cir. 1975) (Connecticut labor organizers); Velez v. Amenta, 370 F. Supp. 1250, 1256 (D. Conn. 1974) (Connecticut teacher, minister and labor organizer); United Farm Workers v. Mel Finerman Co., 364 F.Supp. 326, 329 (1973) (Colorado union organizers in off-site worker housing); State v. Fox, 82 Wash. 2d 289, 291 (1973) (Washington legal aid worker and union organizer); Peterson v. Talisman Sugar Corp., 487 F.2d 73, 76 (5th Cir. 1973) (Florida religious outreach workers) and Lee v. Duda, 310 So. 2d 391, 395-96 (Fla. Dist. Ct. App. 1975) (Florida investigator for legal services organization); Franceschina v. Morgan, 346 F. Supp. 833, 835 (S.D. Ind. 1972) (Indiana federal agency outreach workers and labor organizer); Folgueras v. Hassle, 331 F. Supp. 615, 620 (W.D. Mich. 1971) (Michigan legal aid, food program assistance, and religious services providers); State v. Shack, 58 N.J. 297, 303 (N.J. 1971) (New Jersey attorney and health service provider) and Freedman v. N.J. State Police, 135 N.J. Sup. Ct. 297, 302 (1975) (New Jersey college newspaper photographer); State v. Rewald, 65 Misc. 2d 453, 457-58 (N.Y. Sup. Ct. 1971) (New York college newspaper reporter); Lott v. State, 132 So. 336, 337-38 (Miss. 1931) (Mississippi merchant delivering merchandise). Not included in this catalog are cases addressing access rights solely under labor law.

7. 326 U.S. 501 (1946).

8. United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 910 (1975).

9. 23 Cal. 3d 899 (1979).

10. *See Pruneyard*, 23 Cal. 3d at 910 (holding that the California Constitution, unlike the U.S. Constitution as applied in cases moderating *Marsh*, protects speech on some private property); PruneYard Shopping Center v. Robins, 447 U.S. 74, 88 (1980) (affirming *Pruneyard*, rejecting

Constitution's privacy protections offer an additional measure of protection for workers' right to free association in their homes. Moreover, California's broad public policy of protecting employee rights extends to workers' political expression and to attorneys advocating for the rights of individual workers. If outreach workers were to challenge a trespass charge, the California Constitution, landlord-tenant law, and state public policies would all compel the conclusion that access rights must be guaranteed.

Part I of this note introduces the guest worker program, the role of employer-provided housing for guest and U.S. workers, and the importance of access to this housing for the vindication of workers' legal rights. Part II analyzes the legal and policy arguments supporting a right to visit workers at their homes. This begins with a consideration of First Amendment protections of the right to canvass, and notes the heightened constitutional protection given to political speech, including through legal action. It moves on to analyze cases that have directly addressed the question of agricultural housing access rights. Some of these cases rely on a First Amendment analysis, building on the Supreme Court's protection of the rights of canvassers. Others consider tenant rights or rely on state constitutions. Still others rely on a state action analysis to apply constitutional obligations to private actors. Part III focuses on California constitutional and statutory protections supporting visitors' right to contact workers in agricultural housing. The section begins with California's application of constitutional obligations to private actors through a state action analysis, its criteria for finding state action in criminal enforcement and injunctions, and its reasoning in cases finding state action through the state's entanglement in private actors' conduct. It moves on to consider the California Constitution's privacy guarantees, which extend to private actors. It considers California's statutory protections for workers, and its broad public policy of supporting workers in their efforts to vindicate their rights. The section concludes with the California Constitution's protection of free speech, and analyzes cases demarcating a California constitutional approach to free speech distinct from the Supreme Court's reasoning in its cases concerning free speech rights on private property. In part IV, this Note concludes that while federal constitutional protections for housing access rights are strong, they are stronger still under the California Constitution and California state law, and trespass charges against outreach workers cannot stand. It reviews possible steps to improve protection of California farmworker housing access rights.

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arguments that it infringed on property owner's First Amendment or federally recognized property rights).

## I. BACKGROUND: GUEST WORKERS, AGRICULTURAL WORKER HOUSING, AND ACCESS RIGHTS

Through the H-2A guest worker program, the Immigration and Nationality Act provides a lawful mechanism for employers to hire foreign workers abroad and bring them to the United States for unskilled agricultural work.[11] The guest worker program requires that contracts be certified by the United States Department of Labor and by a state agency (in California, the Employment Development Department).[12] The H-2A program has exploded in recent years: while in 2004 the Department of Labor certified 44,619 H-2A positions, by 2017 the number had risen to 200,049, an increase of over 450%.[13] The increase in California has been even steeper, with more than 15,000 H-2A positions certified in California alone in 2017.[14]

Employers hiring foreign H-2A workers gain a workforce over which they exercise an unusual level of control. The workers are not paid the costs of their inbound travel upon arrival; depending on their rate of pay and the costs of travel, they may not be fully reimbursed for their travel costs until half of the contract period has elapsed.[15] If the worker leaves the job during the contract period, or is fired, the employer will not pay for return travel.[16] A guest worker is not free to seek employment with another employer until the contract term is up, and at that point can only be employed by another employer participating in the H-2A program. Thus, a worker, who may reasonably fear retaliation, has a strong motivation to tolerate illegal abuses.[17]

Agricultural workers are usually socially and geographically isolated from surrounding communities.[18] H-2A workers in particular are alienated from their surroundings. They sign their contracts in their home country. Many are monolingual Spanish speakers, and many others are monolingual speakers of indigenous languages.[19] They generally arrive without their

11. 20 C.F.R. § 655.103(d), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a); 1188(b); 20 C.F.R. § 655.135(c).

12. 20 C.F.R. §§ 655.121, 655.130.

13. *See* David Bacon, *Growing Pains: Guest Farm Workers Face Exploitation, Dangerous Conditions*, part 1, para. 9, CAPITAL & MAIN (https://perma.cc/68GT-G3XA) (discussing rise of H-2A orders in California and workers' motivation to tolerate exploitative labor conditions).

14. *Id.*

15. 20 C.F.R. § 655.122(h)(1).

16. 20 C.F.R. § 655.122(n).

17. *See* Bacon, *supra* n.13, at part 1, para. 6.

18. *See* Shah & Bartlett, *supra* n.3, at 16. *See also UN Human Rights Complaint*, *supra* n.4, at 2-3.

19. *See id.* Shah and Bartlett report that almost eighty percent of migrant workers are foreign born, with 75% of those coming from Mexico, with an average education level of sixth grade. *Id.*; *see also* Philip Martin & Bert Mason, Giannini Foundation on Agricultural Economics, University of California, *California's ALRA and ALRB After 40 Years*, 20 ARE UPDATE 4 (2017), at 2 (https://perma.cc/9ZTU-MFKK) (describing increase in immigrant California farmworkers and reporting that 45% of California farmworkers do not speak any English).

own transportation. Even if they have money and means to leave employer-provided housing, they rarely have family or friends in the area, and they enjoy limited opportunities to build community. Guest workers may live in this isolation for considerable periods of time: H-2A contracts must be "seasonal," but the season with a single employer may last as much as eleven months. If a worker secures a position under a subsequent seasonal H-2A contract, with the same or a different employer, the worker may stay in the United States rather than leaving the country within 30 days. By stringing together H-2A employment, workers may live in the United States in these isolating circumstances for years. U.S. resident migrant farm laborers housed by their employers may be slightly less isolated, but the location and duration of seasonal work militates against community ties.

Although farmworkers' need for services is acute,[20] legal aid attorneys and others seeking to contact workers in agricultural worker housing have faced obstacles for a long time. At least nineteen courts have considered the rights of third parties to visit workers at their employer-provided homes, whether or not the owner posts the property against trespass and independent of access rights guaranteed by labor statutes.[21] The California Supreme Court has recognized in dicta "a First Amendment right of access which belongs both to labor camp inhabitants and to union organizers and attorneys who seek to visit them."[22] The California high court has also reasoned that when the housing is more like a "home or apartment," the worker holds the right to grant or refuse access, since their rights are "*akin to the rights of a person in his own home or apartment*."[23] However, none

20. *See* Yarashes, *supra* n.4, at 2 (listing legal, health, and safety issues affecting farmworkers); Shah & Bartlett, *supra* n.4, at 3 (describing farmworker vulnerability); *UN Human Rights Complaint*, *supra* n.4, at 16-18 (detailing economic, safety, health, language, and cultural circumstances making farmworkers especially vulnerable and in need of services).

21. The cases include Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers), 47 Cal. 3d 157, 179-80 (1988); United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 910 (1975); People v. Medrano, 78 Cal. App. 3d 198, 213-14 (Cal. App. 1978) (rev'd on other grounds); Rivero v. Montgomery Cty., 259 F. Supp. 3d 334, 355-56 (2017); State v. DeCoster, 654 A.2d 891, 894 (Me. 1995); Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 437 F. Supp. 60, 61-62 (S.D. N.Y. 1977); Consol. Cigar Corp. v. Dep't of Public Health, 372 Mass. 844, 852 (1977) (paralegal and chaplain visiting Massachusetts labor camp); Asociación de Trabajadores Agrícolas de P.R. v. Green Giant Co., 518 F.2d 130, 137 (3d Cir. 1975); Velez v. Amenta, 370 F. Supp. 1250, 1256 (D. Conn. 1974); United Farm Workers v. Mel Finerman Co., 364 F.Supp. 326, 329 (1973); State v. Fox, 82 Wash. 2d 289, 291 (1973); Peterson v. Talisman Sugar Corp., 487 F.2d 73, 76 (5th Cir. 1973); Lee v. Duda, 310 So. 2d 391, 395 (Fla. Dist. Ct. App. 1975); Franceschina v. Morgan, 346 F. Supp. 833, 835 (S.D. Ind. 1972); Folgueras v. Hassle, 331 F. Supp. 615, 620 (W.D. Mich. 1971); State v. Shack, 58 N.J. 297, 303 (N.J. 1971); Freedman v. N.J. State Police, 135 N.J. Sup. Ct. 297, 302 (1975); State v. Rewald, 65 Misc. 2d 453, 457-58 (N.Y. Sup. Ct. 1971); Lott v. State, 132 So. 336, 337-38 (Miss. 1931). Not included in this catalog are cases addressing access rights solely under labor law.

22. *Buak Fruit*, 14 Cal. 3d at 910.

23. *Sam Andrews' Sons*, 47 Cal. 3d at 179-80. In some circumstances, as when workers all live in a single dormitory, some reasonable regulations for access may be justifiable in order to protect the

of these California Supreme Court cases squarely addresses the rights of third parties to communicate with workers at their homes.

Courts directly considering the rights of visitors and would-be visitors, notwithstanding other protections granted by statute, have found an access right, with the breadth of that right varying across cases.[24] In 1975, in a case concerning labor organizer access to the workplace and holding that ex parte orders for an injunction against access could not be issued, the California Supreme Court endorsed the First Amendment reasoning in *Peterson v. Talisman Sugar*, *Velez v. Amenta*, *United Farm Workers v. Mel Finerman Co.*, *Franceschina v. Morgan*, *Folgueras v. Hassle*, and *Asociación de Trabajadores Agrícolas de P.R. v. Green Giant* (*Green Giant*), all cases from other jurisdictions holding that third parties had a right to visit agricultural workers in their seasonal homes: "we are persuaded by the reasoning of those decisions, and join in their reading of the First Amendment."[25] These cases arrive at their conclusions by different paths and are discussed below.

Courts have recognized that the profound social, geographic, and linguistic isolation of many workers in employer-provided housing is relevant to legal consideration of the right of others to visit them.[26] Employer-provided housing often compounds the workers' isolation, and provides a powerful additional tool for employers to maintain nearly exclusive control over their workers. Each H-2A worker is entitled to 50 square feet of floorspace,[27] which might be in a shared motel room, lodgings rented from a third party, or in a building on employer property. Workers are often housed in remote locations, perhaps behind closed gates and at the ends of private dirt roads. Although California regulations

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privacy rights of other workers and to prevent "unnecessary interference" with business activities. *Id.* at 180.

24. Only one court evaluating third parties' right to visit workers in their employer-provided homes concluded that constitutional protections did not apply. Ill. Migrant Council v. Campbell Soup Co., 574 F.2d 374, 378 (7th Cir. 1978). The case is discussed below.

25. *Buak Fruit*, 14 Cal. 3d at 910.

26. See Ag. Lab. Rel. Bd. v. Superior Ct. (Pandol), 16 Cal.3d 392, 406-08 (1976); *Rivero*, 259 F. Supp. 3d at 355-56; *DeCoster*, 654 A.2d at 892; Vasquez v. Glassboro Serv. Ass'n Inc., 83 N.J. 86, 98 (N.J. 1980); *Mid-Hudson*, 437 F. Supp. at 61; *Consol. Cigar*, 372 Mass. at 853; *Talisman Sugar*, 487 F.2d at 76; *Fox*, 82 Wash. 2d at 291; *Franceschina*, 346 F. Supp. at 835; *Folgueras*, 331 F. Supp. at 620; *Shack*, 58 N.J. at 303; N.L.R.B. v. Lake Superior Lumber Corp., 167 F.2d 147, 148 (6th Cir. 1948).

27. Worker housing must meet certain standards, including the square footage requirement. 8 U.S.C. 1188(c)(4); 20 C.F.R. § 655.122; 29 C.F.R. § 1910.142. However, job orders may be approved without the required housing inspection. For instance, job order 15799255, which identified the bunkhouse the legal aid worker described above was trying to reach when he was apprehended by ranch personnel and then threatened with citizens' arrest, was approved without a housing inspection. The employers' application described worker housing as "3 dormitories with 94 beds and 1 duplex with 3 beds" and the contract stipulated that "The employer retains possession and control of the housing premises at all times" and that "no tenancy in employer-provided housing is created." Letter from California Workforce Development Agency, *supra* n.2.

require that employer-provided housing facilities be clearly "numbered or designated by street numbers or other suitable means of identification . . . in a conspicuous location facing the street or driveway . . . in letters or numbers at least 3 inches high,"[28] housing inspections submitted as part of California H-2A orders do not document whether or not this requirement is met.[29] Many H-2A workers rarely leave the housing area during the months of their employment, except to be transported directly to work sites in employer-provided transportation, and, if the employer does not provide meals, to a grocery store once a week, again in employer-provided transportation.

Employers may control visitors to the housing they provide, either on their own property or in facilities rented from a third party. When housing is located on employer property, some employers claim that their private property rights give them the authority to post their properties against trespass, and to charge with trespass any third party who attempts to make contact with the workers living in the buildings without an express invitation from an individual worker.[30] Some control access through housing policies provided to workers when they sign their contracts. The policies may limit visitors to those expressly invited, require workers to identify guests by name in a written request for permission, and give the employer the right to deny a visit for no reason; they may impose a blanket ban on visitors of the opposite sex.[31] When employers block attorneys or other outreach workers from isolated workers in employer-provided housing, they effectively insulate their workforce from learning any information about their legal rights.

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28. 25 C.C.R. § 712.

29. *See* for instance the California Employment Development Department's (EDD's) "Housing Inspection Checklist" submitted in support of Job Order 15893597, for 40 workers from June 1, 2018 through August 25, 2018. Provided in response to a Public Records Act request. Letter from California Workforce Development Agency, *supra* n.2.

30. *See Rivero*, 259 F. Supp. at 342 (detailing pattern of employers denying legal aid access to worker residences).

31. For instance, workers coming to the United States under Department of Labor order H-300-18141-36, for 240 workers from July 15, 2018 to November 30, 2018, signed a contract asserting that "Except as required to comply with California labor Code § 1152, no visitors are allowed, without written request by employee to the designated H-2A housing manager, requests for visitors may be denied for no cause. No members of the opposite sex may be in housing rooms at any times." U.S. Department of Labor, Employment and Training Administration, *Agricultural and Food Processing Clearance Order ETA Form 790: Fresh Harvest Job Order H-300-18141-36* (submitted May 11, 2018), at 17 (https://perma.cc/W72J-QAWG) (hereafter, *Fresh Harvest Job Order H-300-18141-36*). California Labor Code section 1152 protects farmworkers' right to engage in concerted activity; *see* discussion *infra* n.220.

## II. LEGAL AND POLICY ARGUMENTS SUPPORTING THE RIGHT TO VISIT AGRICULTURAL WORKERS

### *A. The First Amendment Right to Canvass*

First Amendment protections afforded to canvassers provide one line of argument for protecting third parties' right to approach workers in employer-provided housing without the interference of state actors. These cases recognize a First Amendment guarantee enjoyed by both those who would like to approach the workers and by the workers residing in the dwellings they approach.

The state may not interfere with the ability of canvassers to approach traditional residences to offer information. In a long line of cases, most recently in 2002 in *Watchtower Bible & Tract Society v. Village of Stratton*,[32] the Supreme Court has recognized a free speech interest in approaching residents in their homes, and has therefore "invalidated restrictions on door-to-door canvassing and pamphleteering" as an unconstitutional violation of speech rights.[33] In *Watchtower*, the Court struck down a local ordinance requiring canvassers to get a permit before knocking on doors.[34] Among the Court's concerns were the ordinance's curtailment of spontaneous communication and the ordinance's effect on canvassers' legitimate "anonymity interests": canvassers might be reluctant to get a permit because they would not want to identify themselves to officials out of "fear of economic or official retaliation," chilling their free speech rights.[35] The court notes the particular importance of door-to-door advocacy to "the poorly financed causes of little people."[36]

*Watchtower* expressly affirmed the vitality of earlier rulings protecting the rights of both a speaker to speak to a householder at his or her residence, and the right of the householder him or herself to hear (or refuse to hear) the message offered: "The rhetoric used in the World War II-era opinions that repeatedly saved [Jehovah's Witnesses] from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms," and it noted that values motivating the Allies' fight against totalitarianism remain "unchanged."[37] One of the World War II era cases, *Martin*, begins with the observation that "[f]or centuries it has been a

32. 536 U.S. 150 (2002).

33. *Id.* at 160; *see also* Rivero v. Montgomery County, No. 8:16-cv-01186-PWG (D. Md.), Pls.' Mem. Of Law in Opp'n to Defs.' Mots. To Dismiss, 2016 WL 7210906, 1, 6ff, Nov. 29, 2016 (discussing Supreme Court treatment of First Amendment protection of right to enter private property to speak to residents).

34. 536 U.S.at 154, 169.

35. *Id.* at 166-67.

36. *Id.* at 163 (quoting Martin v. City of Struthers, 319 U.S. 141, 146 (1943)).

37. *Id.* at 160-64, 169.

common practice in this and other countries for persons not specifically invited to go from home to home to knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings."[38] The "master of each household" holds the right to allow or deny such a visit, and a state actor may not make the decision for him or her.[39] The holding in *Martin* does not distinguish between renters and property owners: the Jehovah's Witness pamphleteers distributed to "the inmates of the homes," and the right to do so was not limited by who those "inmates" were.[40] The term "inmate" came from the challenged city ordinance in *Martin v. City of Struthers*, which made it "unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door."[41] The Court recognized that an ordinance might regulate time, place, and manner of distribution, but held that "[t]he right of freedom of speech and press has broad scope."[42]

Some speech is more protected by the First Amendment than others, including attorney speech. The Supreme Court recognizes the importance of litigation to political action and protects attorney speech from unreasonable regulation. The constitutional right to political expression and free association encompasses the right of organizations to pursue litigation, which is "a form of political expression."[43] Thus, the state may regulate "free expression" by attorneys "only with narrow specificity."[44] In *N.A.A.C.P. v. Button*, the court evaluated an "expanded definition of improper solicitation of legal business" introduced in 1956, a change that made illegal the NAACP's standard practice of building school desegregation cases through group meetings and petitions.[45] The Court noted the particular importance of legal action for marginalized communities: "[g]roups which find themselves unable to achieve their

38. 319 U.S. at 141.

39. *Id.*; *see also* Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1365 (2003) (*Hamidi II*) (citing *Martin* for authority that individual employees, not employer, hold the right to choose whether or not to read emails sent to them); Van Nuys Pub. v. City of Thousand Oaks, 5 Cal. 3d 817, 823, 826 (1971) (citing *Martin* as establishing "the significant role fulfilled by house-to-house distribution of ideas"; that householder, not municipality, had a right to turn away a visitor; and that criminal trespass can only occur when a visitor ignores a householder's request to leave and stay away).

40. *Seeid.* at 142.

41. *Id.*

42. *Id.* at 143; *see also Van Nuys*, 5 Cal. 3d at 821 ("the right to 'distribute,' 'pass out,' 'circulate,' or otherwise disseminate ideas has, of course, long been recognized to constitute an integral part of the right of free speech").

43. N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963).

44. *Id.* at 432, 433.

45. *Id.* at 421-23, 425.

objectives through the ballot frequently turn to the courts."[46] Indeed, "association for litigation may be the most effective form of political association"—and even, "under the conditions of modern government, . . . the sole practicable avenue open to a minority to petition for redress of grievances."[47]

The *Button* court thus invalidated Virginia's expanded rules against solicitation by attorneys, reasoning that associational freedoms are "delicate and vulnerable, as well as supremely precious. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[48] It held that only narrowly tailored statutes would survive constitutional scrutiny, warning that "a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression."[49] The Court likened the attorneys of the NAACP to a labor organizer giving a speech, finding that the attorneys, like labor organizers, were entitled to "free trade in the opportunity to persuade to action" when they are "advocating lawful means of vindicating legal rights."[50] Thus, licensing rules broadly constraining attorney communication with prospective clients, rules advancing no substantial regulatory interest, were unconstitutional.[51]

Fifteen years after *Button*, the Supreme Court found that the same constitutional protections extended to legal service providers.[52] In *In re. Primus*, the Court held that anti-solicitation rules could not prevent the ACLU from sending a letter to a woman who had agreed to be sterilized as a condition of continuing receipt of state medical aid.[53] The ACLU's letter advised her of the ACLU's availability to represent her if she chose to pursue a lawsuit.[54] The Court rejected a distinction between the NAACP lawyers of *Button*, who were furthering their political goal of school integration through litigation, and the ACLU lawyers of *Primus*, who provided individual legal services to indigent clients.[55] Both organizations, the Court held, rely on first amendment freedoms to further their political goals, including free access to clients: "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants."[56] States may still impose time, place, and manner restrictions on attorneys, but the regulation must

46. *Id.* at 429.
47. *Id.* at 430-31.
48. *Id.* at 433.
49. *Id.* at 432, 435-36.
50. *Id.* at 437.
51. *Id.* at 437-38, 444.
52. In re. Primus, 436 U.S. 412, 438 (1978).
53. *Id.* at 439.
54. *Id.* at 417.
55. *Id.* at 427-28.
56. *Id.* at 431.

"not abridge unnecessarily the associational freedom of nonprofit organizations, or their members, having characteristics like those of the NAACP or the ACLU."[57]

Some courts rely on constitutional protections of privacy and free association to support outreach workers' right to access farmworker housing without state interference. In *Rivero v. Montgomery County*, in 2017, the federal district court denied a county's motion to dismiss a civil rights claim brought after a sheriff arrested legal aid workers for attempting to visit twelve H-2A workers at an orchard.[58] It held that the legal aid attorneys had a constitutional right to enter housing, and that the workers living there in isolated buildings had a constitutional right to hear what the attorneys had to say: they are "entitled to unfettered exchange of information just as much as any other individual in the community."[59] The issue, as the *Rivero* court frames it, "is not whether farm owners must create a forum for speech, but whether farmworkers forfeit their constitutional rights by living on their employer's premises."[60] The court, citing *Watchtower*, *Martin*, *Button*, and *Primus*, among other cases, held that the legal aid outreach workers had a constitutional right to approach camp housing, and that the workers living there had a constitutional right to hear what the attorneys had to say.[61]

### *B. State Action under Marsh v. Alabama and Its Progeny*

First Amendment protection may extend to labor camps under the state action doctrine articulated in *Marsh v. Alabama*[62] to evaluate access rights at labor camps.[63] The *Marsh* state action doctrine provides that when a private actor opens his private property to others for his own benefit, his obligation to preserve the legal rights of those he has admitted increases.[64] In *Marsh*, the Supreme Court held that a company town, which performed the functions of a municipality and was open to the public, was subject to the Constitution, and so struck down a trespass charge against Jehovah's Witnesses on its streets as a violation of the First Amendment.[65] "Ownership does not always mean absolute dominion," the *Marsh* court noted, and provided a balancing test that subsequent courts have often

57. *Id.* at 439.

58. 259 F. Supp. 3d at 346, 348.

59. *Id.*

60. *Id.* at 355.

61. *Id.* at 334, 348.

62. 326 U.S. 501 (1946).

63. *See* Sam Andrews' Sons v. Ag. Lab. Rel. Bd., 47 Cal.3d 157, 189 (1988) (Arguelles, J. concurring) (explaining the *Marsh* doctrine and describing its application to labor camps).

64. 326 U.S. at 506.

65. *Id.* at 509.

applied: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[66] This balancing guided the Supreme Court for some years. In 1968 in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*,[67] the Court recognized the right of striking workers to picket on parking lots outside a supermarket: although the parking lot was privately owned, it was open to the public, and charging picketers with trespass would "substantially hinder communication of the ideas which the petitioners seek to express to the patrons."[68] The Court noted that historical changes in land use necessitated this adjustment of private property rights: people had begun moving "from the cities to the suburbs," and if courts were to uphold a business owners' absolute right to exclude from their property those communicating criticism, they would be allowing suburban businesses to insulate themselves from protest solely by virtue of the architectural accident of private parking lots.[69] The court's rejection of a property rights argument enabling suppression of political expression can be extended to farmworker housing: instead of maintaining a suburban parking lot, ranch owners post no-trespassing signs, with the same effect of stifling debate.

Subsequent Supreme Court cases have limited *Marsh* by focusing not on its broad test, but on the specific attributes of the private property at issue and contrasting it with the company town in *Marsh.* In 1972 in *Lloyd Corporation v. Tanner*,[70] the Court described the company town as "an economic anomaly of the past," and narrowed the *Marsh* holding: only "where private interests were substituting for and performing the customary functions of government"—where, "[i]ndeed . . . there were no publicly owned streets, sidewalks, or parks where such rights could be exercised"—do First Amendment obligations extend to private actors.[71] Thus *Marsh*, which protected proselytizing by Jehovah's Witnesses on company town streets, had no applicability in *Lloyd*, involving handbilling by anti-war activists at a 70-acre mall with 60 commercial tenants and room for 1000 cars.[72] While the *Marsh* court declined to give legal weight to the company town's "This is Private Property" sign,[73] the *Lloyd* Court held that Lloyd Center's "small signs . . . embedded in the sidewalk" announcing that "Areas in Lloyd Center Used by The Public are Not Public Ways"

66. *Id.* at 506; *see* Fashion Valley Mall v. N.L.R.B., 42 Cal. 850, 858-59 (2008) (discussing *Marsh* and the California Supreme Court's reliance on it).

67. 391 U.S. 308 (1968).

68. *Id.* at 313, 323.

69. *Id.* at 324-25.

70. 407 U.S. 551 (1972).

71. *Id.* at 562.

72. *Id.* at 553, 556, 562.

73. Marsh v. Alabama, 326 U.S. 501, 503 (1946).

expressed a legal truth.[74] While *Lloyd* did not overturn *Logan Valley*, instead narrowing its holding to picketing directly related to the purpose for which the property was being used,[75] in 1976, *Hudgens v. N.L.R.B.* directly overturned *Logan Valley*.[76] The Court reasoned that if, under *Lloyd*, anti-war activists had no First Amendment right of access to a mall, neither could picketers like those granted access under *Logan Valley*, because this distinction amounted to an impermissible content-based restriction on speech.[77] As discussed below, the California Supreme Court does not consider *Lloyd* persuasive in interpreting free speech rights under the California Constitution, and so would be unlikely to apply this reasoning to legal aid outreach to farmworker in their residences.[78]

Some courts have found through *Marsh* a First Amendment right of migrant farmworkers to be accessed by visitors in labor camps, and of would-be visitors to approach them.[79] Lower courts finding First Amendment rights in labor housing have relied on various applications of *Marsh*, or on *Marsh* as modified by subsequent opinions, some also considering the free speech rights of householders, canvassers, and attorneys, following the *Martin* and *Button* lines of cases.

*Lloyd* did not end lower courts' pattern of finding constitutional free speech protections on the private property of labor camps. Even before *Lloyd*, lower courts generally declined to apply a strict fact-to-fact comparison between worker housing and the company town in *Marsh*, and instead use *Marsh* for more general principles. *Folgueras*, decided the year before *Lloyd*, reasoned that "the sum total of the cases applying *Marsh* compel the holding that the owner of these migrant labor camps . . . may not constitutionally deprive the migrant laborers living in his camps, or members of assistance organizations, or mere visitors of reasonable access to his camps."[80] Outreach workers had come to worker housing to offer residents medical, educational, legal, and religious services; they brought suit after they were held at gunpoint by the employer and then cited for trespass.[81] *Folgueras* explained that "ownership alone" cannot give the

74. 407 U.S. at 561, 569.

75. *Id.* at 563-64.

76. 424 U.S. 507, 519 (1976).

77. *Id.* at 521. *Hudgens* went on to consider the striking workers' claims under the National Labor Relations Act (NLRA), and found that the Act, as interpreted in Central Hardware v. N.L.R.B., 407 U.S. 539 (1972) and N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105 (1956), might afford the strikers access rights; it remanded for consideration of their claims under the NLRA alone. *Hudgens*,424 U.S. at 522-23.

78. *See* Fashion Valley Mall v. N.L.R.B., 42 Cal. 850, 861-62 (2008) (discussing the California Supreme Court's divergent path under the California Constitution).

79. *See* Rivero v. Montgomery Cty., 259 F. Supp. 3d 334, 351-55 (2017) (summarizing judicial treatment of the question).

80. Folgueras v. Hassle, 331 F. Supp. 615, 623 (W.D. Mich. 1971).

81. *Id.* at 617.

employer landlord "the right to censor the associations, information and friendships of the migrants living in his camps."[82] To decide otherwise would be to grant the employer outsized control over workers: "real property ownership does not vest the owner with dominion over the lives of those people living on his property."[83] While *Folgueras* cites (and echoes) *Marsh*, the opinion ties the right of services providers to enter the property to the residents' rights as citizens: the residents "are entitled to the kinds of communications, associations, and friendships guaranteed to all citizens, and secured by the Constitution. The owner's property rights do not divest the migrants of these rights."[84] The California Supreme Court endorsed *Folgueras*'s holding that the outreach workers had a constitutional right to enter the property.[85]

Courts considering the access rights question after *Lloyd* have declined to narrow this use of *Marsh.* While sometimes acknowledging *Lloyd*'s focus on the openness of the property as an important criterion for a finding of state action as in *Marsh*, they nonetheless reason that the enclosed nature of a labor camp cannot exclude its residents from constitutional protections. In 1973, *Talisman Sugar*, another of the cases endorsed by the California Supreme Court,[86] addressed the claim of a union attorney and two religious workers who attempted to visit workers at a camp and were arrested for trespass.[87] *Talisman Sugar* characterized *Lloyd* as imposing a two-step balancing test for a finding of state action: "(1) the availability of alternative avenues and (2) the use to which the property is put by the owner."[88] The court analyzed the camp's features in detail, and found it "more closely analogous to the traditional 'company town' than . . . shopping centers": "it was a self-contained community in which municipal

82. *Id.* at 623.

83. *Id.* at 616, 625.

84. *Id.* at 625; *see also* Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 437 F. Supp. 60, 61-62 (S.D. N.Y. 1977) (using similar reasoning to hold that legal aid attorneys had a constitutional right to approach farmhands).

85. United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 910 (1975).

86. *Id.*

87. Peterson v. Talisman Sugar Corp., 487 F.2d 73, 77 (5th Cir. 1973).

88. *Id.* at 82. *Talisman Sugar* was written before the advent of digital communication, but digital communication could not replace in-person outreach to farmworkers. Many migrant farmworkers live on the other side of the digital divide, many are illiterate and speak no English or Spanish, and there is no mechanism that would permit third parties to make direct contact with farmworkers digitally. Moreover, in rural locations like the ones where farmworkers often live, even an expensive smart phone with a paid-up data plan gets no signal. *See* William B. Gould IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C. DAVIS L.R. 1243, 1260 (Feb. 2017) (discussing language, literacy, and technological barriers to communication with farmworkers).

services were afforded for a thousand migrants during the cane-cutting season."[89]

Moreover, *Talisman Sugar* noted that few workers left the camp on their own initiative: lack of transportation, the language barrier, and pennilessness all militated against leaving.[90] It found that "the use to which Talisman has put its property" made "denial of access . . . an unreasonable restraint on the plaintiffs' rights . . . . [T]he mere fact that the owner has sequestered its employees from general social intercourse with mankind can afford it no immunity from the prohibitions of the First Amendment."[91] That is, *Talisman Sugar* reasoned that openness to the public cannot be dispositive in establishing whether or not First Amendment rights survive: "Having located the equivalent of a thousand-resident municipality in the midst of its property, the company must accommodate its property rights to the extent necessary to allow the free flow of ideas and information between the plaintiffs and these migrants."[92] The court also found that the aid workers had no alternative means for reaching the workers.[93] Trips into a nearby town every other Saturday, on company-provided transportation, did not offer "a reasonable opportunity for discussions between the [aid worker] plaintiffs and the workers."[94] *Talisman Sugar* likewise acknowledged the constitutional right of disseminators of information, as well as residents, though it did not decide the case on this basis.[95]

Another post-*Lloyd* case, *Green Giant* in 1975, also endorsed by the California Supreme Court,[96] held that state action and First Amendment rights were not an all-or-nothing matter, at least in the farmworker housing context: "where limited public functions are performed," "[l]imited First Amendment rights may be held enforceable."[97] Thus, residents of a closed Connecticut labor camp did not lose all First Amendment rights, since "[i]n a number of other respects, . . . and in particular from the vantage of those who live within its borders, the camp presents features akin to the company town in *Marsh*."[98] *Green Giant* found in *Lloyd* a "multifaceted inquiry" for a finding of state action, one that considered the nature and attributes of the

89. *Id.*; *see* Lee v. Duda, 310 So. 2d 391, 395 (Fla. Dist. Ct. App. 1975) (finding legal investigator had First Amendment right of access to a smaller camp that was "sufficiently similar" to the one in *Talisman Sugar*).

90. 487 F.2d at 76.

91. *Id.* at 83.

92. *Id.* at 83.

93. *Id.* at 82.

94. *Id.*

95. 487 F.2d 73, 80-81 (5th Cir. 1973) (citing *Martin*); *see also* Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 437 F. Supp. 60, 62 (S.D. N.Y. 1977).

96. United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 910 (1975).

97. Asociación de Trabajadores Agrícolas de P.R. v. Green Giant Co., 518 F.2d 130, 137 (3d Cir. 1975).

98. *Id.* at 138.

property, the relation of the expression to the property, and other avenues of effective expression.[99] Like *Talisman Sugar*, *Green Giant* finds that openness to the public cannot be dispositive: "We do not agree that by removing the element of openness to the public, an owner of private property enjoys an absolute right to forbid the exercise of First Amendment liberties on its premises."[100] However, the *Green Giant* court held that access could be granted only if plaintiffs showed that the workers' isolation prevented any other means of communicating with them, something the plaintiffs had not done: "It was . . . indispensable to their case that plaintiffs present evidence to demonstrate that alternative access to the workers was unavailable or would be ineffective. . . . [I]t would have been helpful to document . . . the physical, psychological, and linguistic isolation of the workers" or "proof of the impracticality of reaching the workers outside the camp's perimeter."[101]

*Velez*, also endorsed by the California Supreme Court,[102] uses reasoning similar to *Green Giant* in its evaluation of a large, self-contained tobacco-picker camp that denied access to a religious outreach worker, a teacher, and a labor organizer: "ownership rights . . . do not include the right to suspend the workers' constitutional freedom of speech, assembly, and religion."[103] *Velez*, too, moderated *Lloyd* with the broad teaching of *Marsh*: "While it is true that 'no trespasser or uninvited guest may exercise general rights of free speech on property owned and used nondiscriminatorily for private purposes,' it must also be emphasized that ownership does not always mean absolute dominion."[104]

Conversely, *Illinois Migrant Council v. Campbell's Soup*, 1978, found that a labor camp located less than a mile from a town which the camp's residents visited often did not share enough attributes with the town in *Marsh* for a finding of state action.[105] *Illinois Migrant Council* analyzed the access question only through a state action lens, using only *Marsh*, as narrowed by *Lloyd* and *Hudgens*.[106] It declined to consider the rights of the residents living in "sixteen family apartments in four buildings and four dormitory structures" to be approached by people hoping to communicate information about "educational, health, and vocational programs," or the right of outreach workers to approach them.[107] The *Illinois Migrant*

99. *Id.* at 137.

100. *See id.* at 138.

101. *Id.*

102. United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 910 (1975).

103. Velez v. Amenta, 370 F. Supp. 1250, 1251, 1256 (D. Conn. 1974).

104. *Id.* at 1250, 1255 (quoting Lloyd Corporation v. Tanner, 407 U.S. 551, 568 (1972); citing Marsh v. Alabama, 326 U.S. 501, 506 (1946)).

105. 574 F.2d 374, 377-78 (7th Cir. 1978).

106. *Id.* at 377.

107. *Id.* at 378-79.

*Council* result would be difficult to reach in California, in part because the California Court still finds a broader reading of *Marsh* persuasive for interpreting free speech guarantees under the California Constitution.[108]

Still other courts have found First Amendment or other constitutional protections[109]for housing access even without reliance on *Marsh* (or *Lloyd*). In 1973 in *United Farm Workers v. Mel Finerman Company*,[110] the Colorado court held that both camp residents and their would-be visitors had First Amendment rights that mandated reasonable access for third parties, even though the housing was a free-standing building located in the middle of a town.[111] *Mel Finerman* does not cite either *Marsh* or *Lloyd*. The California Supreme Court endorsed the *Mel Finerman* holding in 1975.[112]

As discussed further below, a California court called upon to evaluate whether outreach workers have a First Amendment right to approach workers in employer-provided housing would likely follow the on-point First Amendment cases endorsed by the California Supreme Court,[113] in spite of *Lloyd*'s and *Hudgen*'s narrowing of First Amendment protections in private spaces open to the public.[114] It would likely focus on the broad First Amendment rights of canvassers at residences affirmed in *Watchtower*,[115] particularly as the California Supreme Court has rejected "cases excluding noncustomers from shopping centers" as "not apposite" for evaluating free speech rights at labor housing facilities.[116] However, as discussed below, the case under the California Constitution's free speech guarantees would be even stronger.

### *C. Landlord-Tenant Law*

Constitutional free speech and free association protections overlap with tenants' rights of association and protection against interference from their

108. *See* Fashion Valley Mall v. N.L.R.B., 42 Cal. 850, 858, 862 (2008); Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers), 47 Cal. 3d 157, 190 (1988).

109. *See* State v. Fox, 82 Wash. 2d 289, 291, 293 (1973) (holding that First Amendment and Fourteenth Amendment guarantees of a right to counsel meant that a *No Trespassing* sign could not bar legal aid attorneys from approaching potential clients living in a labor camp).

110. 364 F. Supp. 326 (D. Colo. 1974). The opinion does not clarify why it did not evaluate the matter under labor statutes.

111. *Id.* at 329. The *Mel Finerman* court fashioned specific rules governing visitors to the camp, which was located ten blocks from a small town's business district and posted with against trespass. The rules conflict with the holdings of other cases (for instance*, Sam Andrews' Sons*, 47 Cal. 3d at 191; Rivero v. Montgomery Cty., 259 F. Supp. 3d 334, 348 (2017)), and include a requirement that the union organizers give the court a list of names of people who will have access to the camp. *Id.* at 327-28, 329.

112. United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 910 (1975).

113. *Id.*

114. Lloyd v. Tanner, 407 U.S. 551, 569 (1972); Hudgens v. N.L.R.B., 424 U.S. 507, 519 (1976)

115. Watchtower Bible & Tract Society v. Village of Stratton, 536 U.S. 150, 160 (2002)

116. *Buak Fruit*, 14 Cal. 3d at 910.

landlords. Tenant rights have been cited to establish farmworker housing access rights. These cases focus on the workers as legal tenants entitled to the freedoms of other tenants. Common law and some state laws establish the rights of tenants to invitees or licensees. A landlord may not decide a tenant's visitors for her, and her invitees or licensees are not trespassers because the landlord says so.[117] The landlord may not interfere with the residents' right of beneficial enjoyment.[118]

*Franceschina v. Morgan* considered the rights of non-profit outreach workers who were barred from access to the laborers living at a group of farmworker camps where migrants who worked for the camp operator lived alongside migrants who worked for other employers.[119] The federal court in *Franceschina* declined to apply a strict state action analysis following *Lloyd* and *Marsh*, explaining that the analysis was beside the point:

> the [c]ourt believes it begs the real issue to attempt comparison of company camps to company towns . . . . The real question is whether or not the owner of land may lawfully proscribe who may talk to his tenants, and monitor any conversations which may be permitted. The question supplies the answer, which must be in the negative.[120]

The *Franceschina* court found that "the controlling status here is that the migrants are citizens of the United States, residing in their own homes, and are entitled to be treated as such. By the same token, their would-be visitors have the constitutional right to visit with them, subject to the discretion of the migrants and not of the company, its employees, and political auxiliary."[121] *Franceschina* notes that the company provides the housing for its own benefit, and can "no more deny access to those homes to persons going to offer sorely needed assistance . . . than it can enter them, search them, or quarter troops in them."[122]

*Francheschina* found that a migrant worker is "a tenant for the term of the crop season," and entitled to the rights of householders.[123] It cited *Martin* for its holding that "would-be visitors have the constitutional right to visit with [residents of a labor camp], subject to the discretion of the

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117. *See Sam Andrews' Sons*, 47 Cal. 3d at 188-89 (Broussard, J. concurring); Vista Verde Farms v. Ag. Lab. Rel. Bd, 29 Cal. 3d 307, 316 (1981); State v. Dixon, 169 Vt. 15, 18 (Vt. 1999); Arbee v. Collins, 219 Ga. App. 63, 64 (Ga. Ct. App. 1996).

118. Grinnell Bros. v. Asiulewicz, 241 Mich. 186, 188 (Mich. 1927); *see* Cal. Civ. Code § 1927 (guaranteeing exclusive quiet possession to lessee).

119. 346 F. Supp. 833, 835-37 (S.D. Ind. 1972).

120. *Id.* at 838.

121. *Id.* at 838-39 (citing *Martin*); *accord Buak Fruit*, 14 Cal. 3d at 910.

122. 346 F. Supp. at 839.

123. *Id.* at 836-37; *see also* Folgueras v. Hassle, 331 F. Supp. 615, 624-25 (W.D. Mich. 1971) (finding for outreach workers barred from the property in part because "as tenants, the migrants are vested with the full rights of tenancy"); Rodriguez v. Berrybrook Farms, 672 F. Supp. 1009 (W.D. Mich. 1987) (holding that the camp owner was a landlord and the workers tenants, even when they did not pay traditional rent).

migrants and not of the company, its employees, and political auxiliary."[124] The court held that the *No Trespassing* signs, the posted guards, and the sheriff's issuance of a trespassing citation all violated the rights of both the workers "residing in their own homes" and the "would-be visitors" who could be turned away only "at the discretion of the migrants and not of the company."[125] The California Supreme Court has endorsed the reasoning of *Franceschina*, but focused on its First Amendment reasoning, not its consideration of landlord-tenant law.[126]

Other courts have relied exclusively on tenant protections to find in favor of access rights. In *State v. DeCoster*, 1995, the Maine Supreme Court considered workers living in mobile home housing provided by their employer and held that under state law migrant laborers were tenants with a right to quiet enjoyment.[127] Their rights as tenants, as established through common law, guaranteed their right to be visited by family planning educators and legal aid attorneys, as well as friends and family, and justified an injunction barring the employer from posting the property against trespass or requiring that visitors "seek permission from the office before visiting."[128] The *DeCoster* court emphasized that the employer provides housing for his own gain: he "benefits from this arrangement through the wages he is able to pay his workers and by having the workers on the premises immediately available for work."[129] In reaching this conclusion, *DeCoster* noted that workers in employer-provided housing are "tenants incident to employment," and that other cases finding that workers were not tenants addressed only the question of whether tenants were entitled to the same eviction process as other tenants, which was irrelevant for establishing access rights under tenant protections.[130] Having made its

124. 346 F. Supp. at 838-39.

125. *Id.* at 839-40; *see also* Lott v. State, 132 So. 336, 336, 338 (Miss. 1931) (holding that businesspeople delivering wares to residents of a logging camp could not be required to "inquire at office" before approaching their customers: "the landlord has nothing to do with the rights of third persons who go upon the premises, provided they commit no trespass amounting to an injury to the landlord's rights in the land"); Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers), 47 Cal. 3d 157, 191 (1988) (Broussard, J, concurring) ("the grower may only restrict speech activity which would interfere with the running of a communal residence, and then only if the restrictions are narrowly drawn").

126. *Buak Fruit*, 14 Cal. 3d at 910. *Buak Fruit's* endorsement was of *Franceschina*'s First Amendment reasoning. *Id.*

127. State v. DeCoster, 654 A.2d 891, 892, 894 (Me. 1995); *see* Cal. Civ. Code § 1927 (lessee's right to quiet enjoyment).

128. 654 A.2d at 894-95.

129. *Id.* at 894.

130. *Id.* at 893; *see* Vasquez v. Glassboro Serv. Ass'n Inc., 83 N.J. 86, 104, 108 (N.J. 1980) (holding that "a migrant is not a tenant" entitled to unlawful detainer process, because of the terms of the employment contact, but finding the contract unconscionable and directing courts to fashion appropriate case-specific equitable remedies); DeBruyn Produce Co. v. Romero, 202 Mich. App. 92, 102 n.6 (Mich. Ct. App. 1993) (rejecting claim that workers are tenants, but distinguishing this from the question of right of access).

determination under tenant law, *DeCoster* declined to consider constitutional questions.[131]

In 1971, the New Jersey Supreme Court in *State v. Shack*, like the Maine court in *DeCoster*, rested its pro-access conclusion on property rather than constitutional law; it found that property law provided greater protection.[132] In rejecting a trespass charge against a legal services attorney and medical care provider who attempted to visit migrant farmworkers, *Shack* reasoned that the farmworkers were tenants, and "[t]itle to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises."[133] Nonetheless, *Shack* declined to decide based on whether the farmworkers were tenants entitled to receive visitors, or residents incident to employment with no possessory interest, because such an analysis would distort the issue: "We see no profit in trying to decide upon a conventional category and then forcing the present subject into it . . . . The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility."[134] Instead, *Shack* concluded that since "[p]roperty rights serve human values," the trespass charge could not be upheld: "We find it unthinkable that the farmworker-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being."[135] *Shack* does not guarantee unfettered communication with workers in housing on an employer's land: the employer may "reasonably require a visitor to identify himself, and also to state his general purpose, if the migrant worker has not already informed him that a visitor is expected."[136]

California courts have not directly addressed the housing access question under landlord-tenant law, though in 1978 *People v. Medrano*,[137] discussed below, addressed the rights of farmworkers living at a third party's labor camp and found they enjoyed the rights of tenants.[138] Seven years after that decision, California passed the Employment Housing Act,[139] which explicitly defines employer-housing residents as tenants.[140] The

131. 654 A.2d at 894.

132. State v. Shack, 58 N.J. 297, 302-03 (N.J. 1971).

133. *Id.* at 303.

134. *Id.* at 303, 306-07; *see also* Rakas v. Illinois, 439 U.S. 128, 143 (1978) (refusing, in a search and seizure case, to rely on "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like").

135. 58 N.J. at 303, 307.

136. *Id.* at 308.

137. 78 Cal. App. 3d 198, 210 (Cal. App. 1978).

138. *Id.* at 213.

139. Cal. Health & Safety Code §§ 17000-17062.4.

140. Cal. Health & Safety Code § 17009.5(b) ("'Person,' as used in this part, may be used interchangeably with 'tenant' or 'employee,' and those terms are used interchangeably when the context does not imply an employer or an owner of employee housing").

reasoning in *Medrano*, the plain language of the Employee Housing Act, and *Watchtower*'s protections of the rights of canvassers to approach residents in their homes, all direct a California court considering a housing access question under landlord-tenant law to find in favor of visitor access rights.

## III. AGRICULTURAL HOUSING ACCESS RIGHTS IN CALIFORNIA

### *A. First Amendment Guarantees of Housing Access in California*

California courts considering housing access in the context of labor activity have generally analyzed the question under state and federal labor law, not constitutional principles.[141] The California Court has recognized constitutional protections for workers in employer-provided housing. In *United Farm Workers v. Superior Ct. (Buak Fruit)*, the Court considered the validity of *ex parte* issuance of restraining orders limiting protected speech.[142] The case did not involve access to housing: a grower sought an ex parte order limiting picketing at its property.[143] Nonetheless, the court cited six recently-decided housing access cases, all discussed above, in support of its conclusion that both First Amendment and California constitutional rights were at issue and its holding that an *ex parte* order could not stand.[144] Three of the cited cases rely on a state action analysis rooted in *Marsh*: *Talisman Sugar*, *Velez*, and *Green Giant*. Three others rely on a broad First Amendment analysis: *Folgueras*, *Mel Finerman*, and *Franceschina*. The cited cases suggest that either line of argument could be persuasive.

Three years after *Buak Fruit*, the Court of Appeal in *People v. Medrano* found constitutional access guarantees trumped California trespass law.[145] Specifically, *Medrano* considered "whether the generally valid trespass statute may be constitutionally applied in the circumstances to bar defendants from addressing their message to camp inhabitants," and concluded that it could not.[146] *Medrano* used a balancing test rather than a "broad constitutional declaration," distilling from a range of U.S. and California Supreme Court decisions—some made under the National Labor

141. *See* list of cases, *infra* n.235.

142. United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 904 (1975).

143. *See id.* at 905.

144. *Id.* at 914.

145. 78 Cal. App. 3d 198, 210, 214 (Cal. App. 1978) (*rev'd on other grounds at* Vista Verde Farms v. ALRB (UFW), 29 Cal. 3d 307, 325 n.8 (1981)). In *Medrano*, the Court of Appeal had determined, in the part of the opinion overruled by the Supreme Court in Vista Verde, that the NLRA did not apply to farm labor contractors; for this reason, it evaluated the organizers' access rights to a farm labor contractor's camp under trespass law. 78 Cal. App. at 206-07.

146. 78 Cal. App. 3d at 210, 214.

Relations Act—a four-part formula for balancing property rights with access rights:

> (a) The courts will attempt an "accommodation" or "balance" between free speech rights and the property rights of the landowner. (b) The owner's exclusionary assertions receive less weight when the private property "assumes to some significant degree the functional attributes of public property devoted to a public use." (c) The free speech claim receives a greater weight when the entrant and the owner-invited audience share a relationship engendering a common interest in the message. (d) The free speech claim receives less weight when the entrant can reach the audience through adequate, alternative channels of communication.[147]

The *Medrano* court held that "The operator of a farm labor camp has invited farm workers as tenants," and "because these tenants had an interest in maintaining human relationships and communication with the world outside the camp, the camp operator had opened his the camps to limited entry by social and business visitors of the tenants."[148] Since "[f]reedom of communication encompasses the right to receive as well as disseminate information," the worker tenants had not only a right to invite guests, but to be visited by uninvited guests.[149]

The *Medrano* holding that the workers in a farm labor contractor's labor camp were tenants[150] concords with language the California Supreme Court uses in discussing workers living in agricultural worker housing. Workers are "at home" in a labor camp."[151] The employers who provide housing are "landlords":

> When an employer, or . . . employer's contractor, uses his power as landlord to dictate to employees that they cannot receive union visitors in their own homes, that action is in itself an awesome display of power which cannot but chill enthusiasm for union activity. The normal effect of such a showing of control over employees' lives is to give workers a sense of futility and thereby restrain the exercise of self-organizational rights.[152]

California's 1985 Employment Housing Act governing employer-provided housing also uses the language of tenancy, and guarantees due process in evictions.[153] H-2A orders often include a contract provision

147. *Id.* at 212-13.

148. *Id.* at 213.

149. *Id.* at 210.

150. *Id.* at 213.

151. Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers), 47 Cal. 3d 157, 179 (1988).

152. Vista Verde Farms v. Ag. Lab. Rel. Bd., 29 Cal. 3d 307, 317 (1981) (citation omitted).

153. *See, e.g.,* Cal. Health & Safety Code §§ 17009.5(b); 17031.5 (entitled "Employee housing; termination or modification of tenancy; tenants' rights"). Workers are also protected during evictions. Cal. Health & Safety Code, 17031.6. California cases considering worker eviction from employer-provided housing predate the Employee Housing Act. *See* Martinez v. Sonoma-Cutrer Vineyards, 577 F. Supp. 451, 454 (N.D. Cal. 1983) (finding it "extremely doubtful" that workers were entitled to unlawful detainer procedure, and that the lack of clarity insulated from a civil rights claim the sheriff

stating that residence in employer-provided housing creates no tenancy,[154] but, as discussed above, even if valid with respect to eviction procedures, this contract clause does not necessarily eviscerate the associational rights guaranteed to tenants.[155]

The camp in *Medrano* differed in some important respects from much H-2A housing. It was a large camp that housed workers employed by various nearby growers, who hired workers through the farm labor contractor who ran the camp.[156] In general, the camp permitted visitors free access, though it required solicitors to obtain permission to enter.[157] The conflict arose when the camp operator, who was not the direct employer, selectively enforced a no-trespass policy against a union organizer offering workers rides so that they could vote in a union election.[158] These facts—the general openness of the camps and the selective exclusion of one kind of visitor—made the *Medrano* court's decision easier than it might have been had the housing been an isolated building in the middle of an employer's cultivated land which was posted against trespass. However, the reasoning of *Medrano* does not rely on these facts. Rather, *Medrano* emphasizes that "the landowner for his own profit invited an audience onto his property, thus partially insulating them from constitutionally-protected messages."[159] *Medrano*'s holding also makes it clear that third-party landlords may not constrain workers' associational rights.

### *B. California State Action Analysis*

#### *1. Public function*

A California court may use a public function analysis under *Marsh* to find that outreach workers' unsolicited visits to employees in their employer-provided housing during non-working hours are protected by the California Constitution, the U.S. Constitution, or both. In 1988 in *Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers)*,[160] concerning

who evicted striking workers and threw away their things); McWatters v. Union Oil Co., 80 F. Supp. 732, 732-33 (N.D. Cal. 1948) (holding that employees were not tenants, and lost all right to possession when they went on strike). Even in states where statute does not specify eviction procedures from employer-provided housing, this omission not been dispositive for courts in evaluating other rights the workers may have as tenants. *See*, *e.g.*, Grant v. Detroit Ass'n of Women's Clubs, 443 Mich. 596, 608 (Mich. 1993) (employer landlord not excused from notice required in evictions).

154. *See Fresh Harvest Job Order H-300-18141-36*, *supra* n.31, at 9.

155. *See* 1991 Op. Att'y Gen. NY 23; letter from Andrew Vanore, North Carolina General Counsel, to Keith Werner, Nash County Assistant District Attorney, Aug. 21, 1998 (available at *UN Human Rights Complaint*, *supra* n.4, at Attachment 12) (hereafter North Carolina General Counsel letter).

156. 78 Cal. App. 3d at 206-07.

157. *Id.* at 203.

158. *Id.*

159. *Id.* at 212 n.14.

160. 47 Cal.3d 157.

rules for labor organizers accessing farmworker housing under the California's Agricultural Labor Relations Act (ALRA),[161] the majority focused exclusively on statutory protections for organizing activity and did not address constitutional questions. The concurring opinion found this omission consequential, and made its own constitutional analysis, finding "clear unconstitutionality" in the housing rules at issue in the case, which required that each visitor register before entering worker housing.[162] The *Sam Andrews' Sons* concurrence claims that the discussion in *Buak Fruit* thirteen years earlier "demonstrates that we considered labor camps analogous to company towns for the purpose of scrutinizing an employer-landowner's restrictions upon employee-tenants rights of free speech, association, and privacy."[163] *Buak Fruit* does not cite *Marsh*, and, as mentioned before, it cites housing access cases that rely on state action analyses as well as cases that do not. However, the concurring opinion in *Sam Andrews' Sons* suggests that if a *Marsh* state action analysis were required, California courts would be willing to apply *Marsh* as modified in other access cases.

*2. Entanglement*

In addition to or instead of finding state action through a public function analysis under *Marsh* and its progeny, the California Court may find state action through an entanglement analysis.[164] *Gay Law Students' Association v. Pacific Telephone & Telegraph*, which considered Labor Code protections for political activity, also considered the plaintiffs' constitutional claims.[165] The Court distinguished California from federal constitutional protections and analysis and rejected a telephone company's reliance on *Jackson v. Metropolitan Edison*[166] for its claim that it was exempt from constitutional obligations.[167] The *Gay Law Students' Association* Court found it unnecessary to explicitly part ways with the Supreme Court's state action analysis in *Metropolitan Edison* because an "arguably minor procedural due process violation at issue in that case is a far cry from the wholesale practice of employment discrimination allegedly undertaken by a state-protected public utility."[168] Criteria for evaluating

161. Cal. Lab. Code §§ 1140-1166.3. *See* discussion *infra* n.220.

162. 47 Cal. 3d at 191.

163. *Id.* at 190; United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 910 (1975).

164. *See* Adams v. Dept. of Motor Vehicles, 11 Cal. 3d 146, 152 (1974) ("private conduct may become so entwined with governmental action as to become subject to the constitutional limitations placed on state action").

165. 24 Cal. 3d 458, 468-69 (1979)

166. 419 U.S. 345 (1974).

167. 24 Cal. 3d at 469, 469 n.8.

168. *Id.* at 469 n.8; *see Adams*, 11 Cal. 3d at 153 (contrasting state involvement at issue in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) with state involvement in California mechanics' liens).

entanglement may include the level of legislative control, the role of the state agencies in recording transactions, the centrality of courts for enforcement, and particularly whether the action is made possible only "by explicit state authorization."[169]

The California Court may find that H-2A employers should be held to the standard of public entities because of their state-supported monopoly-like character. The California Court has found that private employers enjoying monopoly power granted or protected by the state have a greater obligation to serve public interests: "when the state grants a private entity monopoly power over employment opportunities, the private entity like the state itself may not use such power in an unconstitutional fashion."[170] *Gay Law Students' Association* held that a public utility's restrictions on gay employees ran afoul of common law protections against the abuse of monopoly power.[171] Although a statute also protected employees from discrimination by a public utility, the Court recognized a common law principle that monopoly power subjects the monopolist to greater obligations than if it were a normal participant in the open market.[172]

*Gay Law Students' Association* relied on *James v. Marinship Corporation*, which considered a worker's claim that the union, which ran a closed shop at a shipbuilding yard, could not exclude African Americans from union membership and thereby from employment.[173] The *Marinship* Court rejected the union's argument that because it was a private association, it was free to exclude African Americans from membership.[174] The *Marinship* Court found that "[w]here a union has . . . attained a monopoly of the supply of labor . . . such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations . . . . Its asserted right to choose its own members . . . affects the fundamental right to work for a living."[175] The *Gay Law Students' Association* Court extended the *Marinship* logic to the public utility employment context,

169. Connolly Dev. Inc. v. Superior Ct., 17 Cal. 3d 803, 814-15 (1976); *but see Moose Lodge*, 407 U.S. at 173 ("where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' in order for the discriminatory action to fall within the ambit of the constitutional prohibition") (citation omitted).

170. *Gay Law Students' Ass'n*, 24 Cal. 3d at 472, 484-485; James v. Marinship Corporation, 12 Cal. 2d 721 (1944).

171. 24 Cal. 3d at 480-81.

172. *Id* at 482-83.

173. *Marinship*, 12 Cal. 2d at 730.

174. *Id.* at 740.

175. *Gay Law Students' Ass'n*, 24 Cal. 3d at 482 (quoting *Marinship*, 12 Cal. 2d at 731).

noting the robust common law tradition of treating monopolists differently from others in the market.[176]

H-2A employers enjoy a form of state-sponsored monopoly power. The state has crafted an exception to general immigration laws that permits employers to import workers temporarily.[177] Their employees' wages are set by the state, much like the public utility's rates are set by a public commission.[178] H-2A employers contract with their employees in a foreign country, and the workers travel to the United States only to work for a particular employer—indeed, they may not legally work for anyone other than a certified H-2A employer, a form of control over employment at least as absolute as that wielded by the union in *Marinship*.[179] If the H-2A employees quit or are fired, they lose not only reimbursement for their inbound travel, but their paid ticket home. The broad grant of power given to H-2A employers by the state can be analogized to a monopoly, like Pacific Telephone and Telegraph in *Gay Law Students' Association*: as in the case of the H-2A employers, "to a significant degree, the state has itself immunized PT&T from many of the checks of free market competition and has placed PT&T in a position from which it can wield enormous power over an individual's employment opportunities."[180] This privilege brings obligations: "the holders of a monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others."[181]

The entanglement argument is strongest in the context of H-2A workers, whose employment is most heavily enabled and regulated by the state. It poses the danger of a narrow ruling that protects only H-2A workers, leaving unprotected US-resident workers who live in employer-provided housing. Moreover, the centrality of federal, not state, law to H-2A employment could weaken this analysis under state law. Non-H-2A workers might be encompassed by an entanglement analysis under regulation of employee housing under the California Employee Housing Act.[182] However, licensing requirements alone may not create entanglement.[183]

176. *Id.* at 480-85.

177. *See* Connolly Dev. Inc. v. Superior Ct., 17 Cal. 3d 803, 815 (1976).

178. *See Gay Law Students' Ass'n*, 24 Cal. 3d at 469-70.

179. *See* 12 Cal. 2d at 740.

180. 24 Cal. 3d at 472.

181. *Id.* at 482 (citing *Marinship*, 25 Cal. 2d at 732).

182. Cal. Health & Safety Code § 17000 *et seq*.

183. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); *see* Garfinkle v. Superior Court, 21 Cal. 3d 268, 276 (1978) (nonjudicial foreclosure procedures regulate a private contractual transaction and do not create state action).

*3. State enforcement of trespass laws and injunctions*

Enforcement of trespass statutes and injunctions barring entry may also implicate state action in California. In California, criminal enforcement constitutes state action: "the use of government power, whether in enforcement of a statute or ordinance or by an award of damages or an injunction in a private lawsuit, is state action that must comply with First Amendment limits."[184]

California's trespass statute makes "entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession" a trespass.[185] The statute includes specific trespass protections for agricultural land. Trespass includes, specifically, willful entry to lands where animals are raised for food, if *No Trespassing* signs are displayed, or which are fenced and "under cultivation," whether or not posted against trespass, or uncultivated land posted against trespassing.[186] However, entry onto such land for at least some valid purposes, such as to seek work, is not a trespass.[187]

Farmworker housing is frequently located on agricultural land. An entrant onto such lands commits a trespass by "[r]efusing or failing to leave the lands immediately upon being requested by the owner of the land, the owner's agent, or by the person in lawful possession to leave the land."[188] The statutory language leaves doubt about whether each of the three possible parties in control of the land—the owner, the owner's agent, or the person in lawful possession—is entitled to ask the entrant to leave, or whether only the party in lawful possession has that right. H-2A worker contracts may specify that worker housing remains under employer control during the workers' residence there, even when it is leased from a third party; the enforceability of this contract term has not been tested in California; other authorities question its power to gut associational rights.[189]

The Supreme Court recognizes that trespass laws, strictly applied, may run afoul of the First Amendment, at least in the context of public housing.

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184. Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1364 (2003) (*Hamidi II*); *see also* Fashion Valley Mall v. N.L.R.B., 42 Cal. 850, 865 n.8 (2008) ("*the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may be persuaded to take action inconsistent with its interests*" (citing Thornhill v. Ala., 310 U.S. 88, 104-105 (1940))) (italics in quoted text); *see also* N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 893, 911-12 (1982) (finding unconstitutional on First Amendment grounds an injunction protecting private businesses from ongoing protest).

185. Cal. Pen. Code 602.5 § (m).

186. *Id.* at §§ (h), (*l*).

187. In re. Davis, 18 Cal. App. 2d 291, 298 (1936).

188. Cal. Pen. Code 602.5 § (*l*)(1).

189. *See* 1991 Op. Att'y Gen. NY 23 (Nov. 25, 1991) ("a provision in a lease for migrant worker housing which would prevent access to visitors supplying essential services would offend public policy, affronts the sense of decency, and would be unconscionable").

In *Virginia v. Hicks*,[190] the Supreme Court considered a facial challenge to a housing authority's no-trespass rule, and found that the rule passed constitutional muster.[191] The housing authority's rule allowed the police to notify anyone found on the premises who could not "demonstrate a legitimate business or social purpose" that they could not return, and authorized them to arrest the person for trespass if the person refused to leave or returned.[192] The Court found the rule addressed a legitimate government purpose without trampling on First Amendment rights, reasoning that not all entry exposed a person to a trespass charge: "until one receives a barment notice, entering for a First Amendment purpose is not a trespass."[193] However, *Hicks* reaffirmed the vitality of First Amendment protections, particularly for certain kinds of speech, citing several cases addressing the right of attorneys to solicit clients to vindicate their legal rights:

> The showing that a law punishes a 'substantial' amount of protected free speech 'judged in relation to the statute's plainly legitimate sweep'. . . suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." . . .
> We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634; . . . *NAACP v. Button*, 371 U.S. 415, 433. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, *Dombrowski v. Pfister*, 380 U.S. 479, 491, and n. 7, 497 [1965],— harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.[194]

In Maryland in 2017, the district court in *Rivero* read trespass law more expansively than the express terms of the statute. Maryland's trespass law, unlike California's, includes a carveout protecting those who live on agricultural land: "wanton entry on cultivated land" is a trespass, but "[t]his section . . . does not prevent a person who resides on cultivated land from

190. 539 U.S. 113 (2003).

191. *Id.* at 123.

192. *Id.* at 116.

193. *Id.* at 122-23.

194. *Id.* at 119. *See also* Legal Servs. Corp. v. Velasquez, 531 US 533, 546 (2001) (holding unconstitutional on First Amendment grounds a rule limiting LSC-funded attorneys from raising constitutional challenges to welfare laws). *Vasquez* found that Congressional limitations on LSC attorney speech, particularly since their clients were unlikely to find any other lawyer, was an attempt to "exclude from litigation" arguments Congress found inconvenient. *Id.* Since H-2A workers can only challenge administration of the H-2A program through legal action if they can consult with attorneys, government-enforced trespass laws that impede access to an attorney would effect an exclusion from litigation legal challenges to H-2A program administration.

receiving a person who seeks to provide a lawful service."[195] In *Rivero*, however, the court held that First Amendment protections would operate whether or not the statute included such a carveout: "service providers such as Legal Aid have a First Amendment right to engage in door-to-door outreach until they are legitimately turned away by the property owners or residents and . . . Maryland law prohibits farm owners from turning away individuals attempting to speak with farmworkers housed on their property."[196] It declined to find that farmworkers have a right to be visited only because of the trespass statute: even if the law were "ambiguous as to service providers' right to disseminate information, speakers do not require an engraved invitation to the state to engage in First Amendment activity."[197]

A challenge to California's trespass law as applied to legal aid workers attempting to contact isolated workers in employer-provided housing on private property would raise a constitutional question. *Medrano* has already questioned the constitutional validity of a strict application of California's trespass statute.[198] A court could construe the statute as including an implied exception for visitors to workers in employer-provided housing, perhaps by concluding that the workers are in "lawful possession" of their residence and that they, not the owner, hold the right to enforce trespass rules.[199]

### *C. Privacy Protections under the California Constitution*

Several cases cited above consider workers' constitutional or common law right to privacy in their dwellings as relevant to the question of access.[200] Other legal protections also recognize a right to privacy in employer-provided housing. California's constitution extends privacy protections to private actors. California courts evaluate privacy interests through an analysis guided by *Hill v. National Collegiate Athletic Association*.[201] A plaintiff may bring a claim of invasion of privacy when it can demonstrate a legally protected privacy interest, a reasonable

195. Md. Code, Crim. Law § 6-406; *see also* Rivero v. Montgomery Cty., 259 F. Supp. 3d 334, 345 (2017).

196. 259 F. Supp. 3d at 348.

197. *Id.* at 345.

198. 78 Cal. App. 3d 198, 210 (Cal. App. 1978) (rev'd on other grounds).

199. *See also* Van Nuys Pub. v. City of Thousand Oaks, 5 Cal. 3d 817, 828 n. 7 (1971) ("'The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application'" (citing *Button*, 371 U.S. at 432-33)).

200. *See, e.g.,* Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers), 47 Cal. 3d 157, 179-80 (1988); United Farm Workers v. Mel Finerman Co., 364 F.Supp. 326, 329 (1973).

201. 7 Cal. 4th 1 (1994).

expectation of privacy, and a serious invasion of that interest; the plaintiff will not prevail "if the invasion is justified by a competing interest."[202] *Hill* considered mandatory drug testing of college athletes, who were required to urinate in front of an observer, and held that invasions of privacy by private actors were subject to a different analysis than similar conduct by state actors because "[i]nitially, individuals usually have a range of choice among landlords, employers, vendors and others with whom they deal."[203]

Employer attempts to control who workers come in contact with at their homes is an invasion of their privacy. H-2A workers have no meaningful choice in accepting housing rules that limit or bar visitors, even if they see a contract before coming to the United States to work.[204] Moreover, the state's active involvement in H-2A contract approval, as well as the clear benefit derived by employers through opening up their property, suggests that invasions of privacy by H-2A employers should be held to a higher standard (see discussion above). Importantly, the Court clarified that *Hill* cannot be read as weakening California privacy protections.[205] *Hill* cannot be read to mean that any privacy intrusion may be legitimate as long as the defendant has a strong justification.[206] The Court explicitly distinguished the employment context from the college sports context considered in *Hill.*[207]

Courts have considered privacy interests in farmworker housing in the context of Fourth Amendment protections. In employer-provided housing, as in other kind of housing, workers are protected against warrantless search and seizure. In *LaDuke v. Nelson*,[208] the Ninth Circuit held that the INS may not search employer provided housing, like farm housing, without a warrant: "the measure of protection accorded the home under the Fourth Amendment is qualitatively different from that afforded the workplace."[209] Therefore, the requirements for a search at migrant labor camps cannot be less than what would be guaranteed if the workers lived separately from their employer's property: "house-to-house searches would not be

202. *Id.* at 35, 37-38.

203. *Id.* at 38.

204. H-2A contracts are not negotiated with workers: workers sign the contract as already approved by the Department of Labor. Moreover, workers are rarely given a paper copy of the contract, even when they are hired by legitimate recruiters, and most have paid a labor recruiter before they get the job, despite laws barring recruiters from charging workers. *See* Centro de los Derechos del Migrante, *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change*, at 16, 21 (2013) (https://perma.cc/ARX5-7HE4). Thus, workers are not meaningfully informed; nor are they meaningfully free to decline, since they have usually already paid a significant fee to the recruiter asking for their signature on a contract.

205. Loder v. City of Glendale, 14 Cal. 4th 846, 894 (1997).

206. *Id.*

207. *Id.* at 895-96.

208. 726 F.2d 1318 (9th Cir. 1985).

209. *Id.* at 1328-29.

permitted . . . without individualized suspicion," and no lower burden is required before agents can surround labor camps, block the exits, shine flashlights into the windows, and question all those present.[210]

Nor can law enforcement use third party consent as authority to search. In *LaDuke*, the INS itself acknowledged that it would have to obtain the consent of the housing occupants, not that of the owner, to conduct a warrantless search, while in a workplace setting it would require the consent of the owner.[211] This does not change when the lodging is less traditional: "the owners of property may consent to a police search thereof as long as no other persons are legitimately occupying that property," and so landlords, boarding house supervisors, hotel clerks, and hosts of houseguests are all unable to provide consent.[212] College dormitories fall under the same protections, notwithstanding any contract term authorizing room inspections, even inspections undertaken in response to suspicious activity.[213] In considering the question, the Court of Appeal reasoned that students' protection from illegal search and seizure cannot hinge on whether they live on or off campus: "courts are understandably reluctant to put the student who has the college as a landlord in a significantly different position than 'a student who lives off campus in a boarding house.'"[214] The dormitory room is the student's "house and home" as much as shared room in an off-campus apartment would be.[215] A privacy interest recognized under Fourth Amendment jurisprudence does not establish a possessory interest in property, and thus does not settle the question of whether migrant farmworkers in employer-provided housing enjoy a broader right to privacy. However, privacy expectations under search and seizure jurisprudence are relevant because Fourth Amendment rights may rest on a foundation of property law or other authority.[216]

Nor can employers claim to be protecting their workers' privacy for them. The *Sam Andrews' Sons* concurrence notes that the Court found no evidence that "visitors—union or otherwise—had invaded the privacy of camp residents, or that residents had invoked their privacy rights," and thus endorses the Court of Appeal's holding that the employer could not claim that his housing rules controlling visitors were a legitimate effort to protect the privacy of the tenants who lived on its land.[217]

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210. *Id.* at 1331, 1327.

211. *Id.* at 1328-29.

212. People v. Superior Ct., 143 Cal. App. 4th 1183, 1200 (2006).

213. *Id.*

214. *Id.* at 1202.

215. *Id.* at 1207.

216. Rakas v. Ill., 439 U.S. 128, 143 n.12 (1978).

217. Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers), 47 Cal. 3d 157, 189 (1988).

### *D. California's Broad Public Policy of Protecting Employees' Rights*

California has a broad public policy of protecting employees' rights, individually or collectively, to bargain effectively with employers.[218] Section 923 of the Labor Code, enacted in 1937, applies broadly, and expressly recognizes that "the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."[219] Because of the imbalance of power inherent in employer-employee negotiations, "it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, and "he shall be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives." One example of California's public policy of extending worker rights protections to agricultural workers is evident in the language and scope of the ALRA.[220]

Speech vindicating labor rights is particularly protected. California free speech protections are heightened when the speech is related to the private property on which it takes place, particularly where that activity is part of "concerted activities of employees for the purpose of collective

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218. *See* Cal. Lab. Code §§ 923, 1140.2; Chavez v. Sargent, 52 Cal. 2d 162, 174 (1959); Gelini v. Tishgart, 77 Cal. App. 4th 219, 224-27 (1999); Montalvo v. Zamora, 7 Cal. App. 3d 69, 73 (1970).

219. Cal. Lab. Code § 923.

220. *Id.* California's Agricultural Labor Relations Act, codified at Cal. Lab. Code §§ 1140-1166.3, echoes the language of Labor Code section 923, using many of its phrases verbatim, including the guarantee of "full freedom of association, self-organization, and designation of representatives." Cal. Lab. Code § 1140.2. The ALRA protects California farmworker organizing rights, remedying their exclusion from the National Labor Relations Act. *See* Philip L. Martin, *A Comparison of California's ALRA and the Federal NLRA*, CAL AGRIC. 6, 6 (July-Aug. 1983) (explaining how California's enactment of the ALRA differs from other states' decision to simply extend the NLRA to agricultural workers).

Because the ALRA addresses access questions, California courts have often been called upon to adjudicate the access rights of organizers, who are restricted to reasonable time, place and manner restrictions. See Martin & Mason, *supra* n.19, at 10.

This note focuses on access rights for outreach workers who are not union organizers. Organizing rights, which are granted by statute, not guaranteed by constitution or common law, are more susceptible to limitations on time, place, and manner. By focusing on access rights rooted in constitutional protections and common law, this note aims to provide an access guarantee that protects farmworkers' basic human rights, whether or not a union reaches them. The need to establish access rights separate from labor organizing rights is all the more pressing since agricultural labor organizing has plummeted. *See id.* at 11.

It is worth noting that the ALRA, like the NLRA, also protects non-union concerted activity by workers. The decline of union strength has brought an increase in ALRA cases concerning the efforts of non-union workers' concerted efforts to protect their rights. Gould, *supra* n.88, at 1255 ("Into the vacuum left by the absence of union organizing . . . have stepped the so-called 'concerted activity' cases" involving workers "banding together to protest employment conditions without any contact or involvement with the union at all"). The ALRA's relevance to these non-union cases offers another illustration of the breadth of California's public policy commitment to workers' right to fight for improved conditions.

bargaining or other mutual aid or protection."[221] California Labor Code section 923 "specifically subordinat[es] the rights of the property owner to those of persons engaging in lawful labor activities," and creates an exception to criminal trespass laws.[222]

Employees' political speech is also expressly protected by the California Labor Code.[223] *Gay Law Students' Association* found that the phone company had violated the California Labor Code protections against interference with employees' political activity through its policy against "'manifest' homosexuals and against persons who 'make an issue of their homosexuality'"[224]: the policy "tend[ed] to control or direct the political activities or affiliations of employees' in violation of [Labor Code] section 1101, and . . . 'attempt(ed) to coerce or influence . . . employees . . . to refrain from adopting (a) particular course or line of political . . . activity' in violation of section 1102."[225] The political activity protections in the Labor Code, the Court held, "cannot be narrowly confined to partisan activity": the anti-gay conduct rules were effectively bars to political expression, just as the attorney solicitation rules limiting the NAACP in *Button* were restrictions on political speech.[226] While the holding of *Gay Law Students' Association* may not directly protect third parties who attempt to approach workers in housing, it suggests that language in H-2A contracts claiming an employer policy of vetting potential visitors would be found to violate the Labor Code's directive that no employer "shall make, adopt, or enforce any rule, regulation or policy . . . controlling or directing, or tending to control or direct the political activities or affiliations of employees," as well as its protection against employer coercion of employees' political actions.[227] Thus, a worker could bring a claim against an employer for such a contract provision.

California's public policy of protecting workers as they bargain with employers is clear, but its application to individuals as well as groups is less clear. The Labor Code protects a range of activities and refers, variously, to individual and to group action. Section 923, the general provision, and

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221. Ralphs Grocery Co. v. United Food & Com. Workers' Union Local 8, 55 Cal. 4th 1083, 1096 (2013); *see also* People v. Medrano, 78 Cal. App. 3d 198, 212 (Cal. App. 1978) (rev'd on other grounds) ("free speech claim receives greater weight when the entrant and the owner-invited audience share a relationship engendering a common interest in the message").

222. *Ralphs,* 55 Cal. 4th at 1096 (citing Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, 61 Cal. 2d 766, 769 (1964)); *see also* Allred v. Shawley, 232 Cal. App. 3d 1489, 1496 (1991) (distinguishing "generalized free speech" activity, such as abortion protests, from free speech given "heightened" protection, such as union activity).

223. Gay Law Students' Ass'n v. Pac. Tel. & Tel., 24 Cal. 3d 458, 486-87 (1979) (citing *Button*); Cal. Lab. Code §§ 1101-1102.

224. 24 Cal. 3d at 488.

225. *Id.*

226. *Id.* at 487-88.

227. Cal. Lab. Code §§ 1101, 1102.

section 1140.2, the agricultural provision, differ in their designation of the protected party: while the general labor provision talks about "the individual workman" and his right to "representatives of his own choosing," the agricultural provision guarantees the right of "agricultural workers" to "representatives of their own choosing." Both of these Labor Code sections are confusing in the mismatch between their broad opening claims—workers', or an individual worker's, right to associate freely, negotiate, and choose representatives, and to do so without employer interference—and their narrow concluding sentences, which specify that the enumerated activities are protected for the purpose of collective bargaining. Regulations governing access make a similar move from acknowledging the broad right of association identified in the ALRA followed by regulations tailored to labor organizers alone.[228]

However, courts have held that section 923 identifies a broad public policy that protects individual employees in their relationships to their employers, not only groups of employees organizing in a traditional union context.[229] The *Gelini v. Tishgart* court analyzed prior Courts of Appeal cases, California Supreme Court approval of those cases, and the language of the statute to arrive (reluctantly) at its holding that section 923 does not protect "individual workers only insofar as they band together to negotiate with their employer," but also when they negotiate as individuals and choose an agent to represent their interests.[230]

*Gelini* addressed specifically the right of a worker to designate an attorney to negotiate the terms of an employment contract. The worker was fired after she hired an attorney to represent her in a discrimination claim against her employer, who reduced her hours and pay after she informed the employer that she was pregnant.

The court held that Labor Code section 923 does not protect only group action by employees, holding that in contrast to the NLRA, "which protects only concerted activity," "individual employees are protected by section 923."[231] The *Gelini* court also held that California has a broad public policy protecting individual employee action, holding that section 923 "clearly expresses the Legislature's view that public rather than purely private interests are at stake," and that "the public policy at issue here is substantial and fundamental."[232] The *Gelini* found this reading of section 923 "not obvious" and noted its belief that "the fairest reading of the statutory terms, taken as a whole, is that the Legislature meant to protect individual workers only insofar as they band together to negotiate with their

228. Cal. Code Regs. tit. 8 § 20900(e).

229. Gelini v. Tishgart, 77 Cal. App. 4th 219, 224-27 (Cal. App. 1999).

230. *Id.* at 228.

231. *Id.* at 225.

232. *Id.* at 226-27.

employer."[233] However, it finds that the courts' construction of section 923 compels the holding in *Gelini*, and defers to the California Supreme Court for any change to the "settled interpretation" established through caselaw.[234]

None of the California Supreme Court cases most directly addressing camp access by organizers cites Labor Code section 923.[235] In *Buak Fruit*, the California Supreme Court specifically names attorneys, separate from union organizers, as among those with a First Amendment right of access to labor camps, identifying "a First Amendment right of access which belongs . . . to union organizers and attorneys."[236] A court interested in narrowly construing the applicability of union access cases to attorney access cases might construe the sentence identifying this right as guaranteeing access only to *union* attorneys.

Under federal and state law, access to employer-provided housing is guaranteed to labor organizers when it is not possible to communicate with the workers in another way. In *Lechmere, Inc. v. National Labor Relations Board*,[237] the Supreme Court held that organizer access to employer-owned property is warranted to protect workers' right to organize under the National Labor Relations Act when employees are otherwise inaccessible.[238] The *Lechmere* Court held that "the exception to the *Babcock* rule" barring trespassory access by organizers was drafted specifically for situations where "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them."[239] Mining and logging camps and remote resort hotels, for instance, are "[c]lassic examples" of situations warranting "nonemployee organizational trespassing" in order to "protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society."[240]

California is slightly more protective of access rights than is *Lechmere*, and this broader protection may extend to activities other than traditional labor organizing.[241] The Agricultural Labor Relations Act announces that

233. *Id.* at 228.

234. *Id.*

235. *See* Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers), 47 Cal. 3d 157 (1988); Karahadian Ranches Inc. v. Ag. Lab. Rel. Bd. (United Farm Workers), 38 Cal. 3d 1 (1985); Carian v. Agricultural Labor Relations Board, 36 Cal. 3d 654 (1984); Vista Verde Farms v. Ag. Lab. Rel. Bd, 29 Cal. 3d 307 (1981); Ag. Lab. Rel. Bd. v. Superior Ct. (Pandol), 16 Cal. 3d 392 (1976); United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902 (1975).

236. 14 Cal. 3d at 910.

237. 502 U.S. 527 (1992).

238. *Id.* at 539.

239. *Id.* (quoting Nat'l Lab. Rel. Bd. v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)).

240. *Id.* at 539-40.

241. Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers), 47 Cal. 3d 157, 175-76 (1988) (affirming that the Labor Code guarantees "the right of agricultural employees and union

California's policy "to encourage and protect the right of agricultural employees to full freedom of association" for purposes of labor negotiation "or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[242] The Act guarantees labor organizers access to workers in their homes, "wherever that home is," and California courts have been broadly protective of that guarantee.[243] The courts' broad interpretation of "homes," and their broad characterization of people's rights when they are at home, may lead courts to extend labor organizing protections to other service providers communicating with workers at home in non-working hours.

The workers' home may well be a labor camp.[244] The worker residing at the camp may of course refuse to speak to an organizer, but "[t]he owner or operator of a labor camp cannot exercise that right for the worker."[245] Employers may not unilaterally control organizer access to the home.[246] In *Sam Andrews' Sons*, the Court held that "the workers have a right to be visited at the camp," meaning that an uninvited visitor can approach.[247] In *Vista Verde Farms v. Agricultural Labor Relations Board*, the Court held that "both in physically confronting the labor organizers and in barring their communication with workers in the workers' own homes constituted improper 'interference with, coercion and restraint' of workers in the exercise of their statutorily protected rights under section 1153" of the Labor Code.[248]

Labor organizers do not violate trespass statutes when they enter farms to communicate with workers, subject to some reasonable restrictions and a showing that alternative means of contact are lacking.[249] Access may

representatives to exchange information at an agricultural labor camp," holding that this is true whether or not the employer believes there is an adequate "alternative means of communication"); *accord* Karahadian Ranches Inc. v. Ag. Lab. Rel. Bd. (United Farm Workers), 38 Cal. 3d 1, 8 (1985) (union organizer was lawfully present in camp kitchen).

242. Cal. Lab. Code § 1140.2; *see also* Cal. Lab. Code § 1152; Cal. Code Regs. tit. 8 § 20900(a); Ag. Lab. Rel. Bd. v. Superior Ct. (Pandol), 16 Cal.3d 392, 409, 392 (1976).

243. Cal. Lab. Code §1153;Vista Verde Farms v. Ag. Lab. Rel. Bd, 29 Cal. 3d 307, 316 (1981).

244. *Vista Verde*, 29 Cal. 3d at 316.

245. *Id.*

246. *Id.*

247. 47 Cal. 3d 157, 179 (1988).

248. 29 Cal. 3d at 316.

249. Ag. Lab. Rel. Bd. v. Superior Ct. (Pandol), 16 Cal.3d 392, 409, 403-04, 409, 419 (1976); *Sam Andrews' Sons*, 47 Cal. 3d at 176. A recent constitutional challenge to the ALRB workplace access rules upheld in *Pandol* has failed thus far. In *Cedar Point Nursery v. Shiroma*, 2019 WL 2017196 (9th Cir. May 8, 2019), the Ninth Circuit affirmed dismissal of a grower's case claiming that the ALRB's access rules were an unconstitutional taking. *Id.* at 9. A strong dissent finds the ALRB access regulations a physical occupation that unduly interferes with the property owner's right to exclude. It is too soon to know whether the grower will petition for *certiori*. *See also* Gould, *supra* n.88, at 1263-68 (discussing *Cedar Point* and its relationship to a proposed ALRB education-only access rule and opining that *Cedar Point* (as decided at the district level) would not invalidate them). *See* discussion of insufficiency of digital outreach to farmworkers, *supra* n.88.

include bunkhouses and other employer-provided housing, again subject to reasonable rules.[250] In general, organizer access to labor camps is most appropriate when workers are not working and are in their residences; during such times, however, organizer access for communication is presumptively reasonable: "absent extraordinary circumstances it is an unfair labor practice for the employer to prohibit such activity during nonworking hours."[251] Such visits presumptively concord with the reasonable time, place and manner restrictions employers may place on such interactions.[252]

The California Court has elsewhere held that conduct likely to coerce or intimidate employees—whether or not intended for that purpose—is a violation of the National Labor Relations Act.[253] In *Carian v. Agricultural Labor Relations Board*, the employer asked employees to fill out address cards that he told them would be given to the union, who would use the cards to contact them; he also informed the workers that they were not required to complete the cards.[254] The Court held that this practice constituted an impermissible form of interrogation, with the likely effect of chilling employee communication with the union.[255] Thus, *Carian* could be useful in challenging access rules that compromise anonymity interests or otherwise chill communication between legal outreach personnel and vulnerable workers.

### *E. Free Speech Protections under the California Constitution*

California's free speech protections are not identical to those offered by the First Amendment. In 1979, *Robins v. Pruneyard Shopping Center* established that free speech guarantees under the California Constitution are more protective of the right.[256] In *Pruneyard*, the California Supreme Court held that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, even when the [shopping] centers are privately owned."[257] It reasoned that without such protection, citizens in an increasingly suburbanized world would be cut off from a vital

250. *Pandol*, 16 Cal. 3d at 406-07; *Sam Andrews' Sons*, 47 Cal. 3d at 180; *see also* N.L.R.B. v. Lake Superior Lumber Corp., 167 F.2d 147, 151-52 (6th Cir. 1948) (upholding "reasonable rules" governing conduct and visitation, but holding under that the NLRA compelled a grant of access to the bunkhouses, not just to the recreation area of a lumber camp).

251. *Pandol*, 16 Cal. 3d at 405; *see* Cal. Lab. Code §§ 1140.2, 1152; Cal. Code Regs. tit. 8 § 20900.

252. *See* Cal. Code Regs. tit. 8 § 20900(e).

253. Carian v. Agricultural Labor Relations Board, 36 Cal. 3d 654, 672 (1984); Karahadian Ranches Inc. v. Ag. Lab. Rel. Bd. (United Farm Workers), 38 Cal. 3d 1, 8, 10 (1985).

254. 36 Cal. 3d at 672.

255. *Id.* at 672-73.

256. 23 Cal. 3d 899, 910 (1979).

257. *Id.*

source of ideas and information.[258] The burden on the property owner, moreover, would be small in comparison to the benefit to the public.[259]

The broader free speech protections recognized by *Pruneyard* might be useful. However, their value must be read alongside the California Court's own suggestion that housing access cases are different. In *Buak Fruit*, decided four years before *Pruneyard*, the Court found supermarket access cases "not apposite" to housing access cases.[260] Arguably, the supermarket cases are "not apposite" partly because they do not sufficiently protect the rights of workers at labor camps. As the concurring opinion in *Sam Andrews' Sons* emphasizes, *Buak Fruit* "made it clear that union organizers and workers have reciprocal labor camp access and speech rights under both the federal and state Constitutions,"[261] indicating that even labor organizers' access was grounded in more than statutory protections. Moreover, the California Court's fractured opinion in *Golden Gateway Center v. Golden Gateway Tenants' Association*[262] illustrates the court's difficulty in applying *Pruneyard* outside of situations closely analogous to that of *Pruneyard* itself—that is, a situation in which a business bars certain third parties from its otherwise public space. In *Golden Gateway*, the court considered *Pruneyard* in the context of unsolicited handbills deposited under or near apartment doors in the interior corridors of an apartment building, and issued no majority opinion. *Golden Gateway* receives further discussion below.

The California Supreme Court continues to rely on a broad understanding of free speech protections. In *Fashion Valley Mall v. National Labor Relations Board*, a case finding that a mall could not block picketing in support of a secondary boycott of one of its stores, the Court affirmed *Pruneyard*, and characterized California's constitutional free speech protection as remaining faithful to First Amendment reasoning from which the U.S. Supreme Court has retreated, as well as to earlier California free speech cases protecting speech on private property.[263] *Fashion Valley* affirms the vitality of the *Marsh* balancing test in California, quoting the familiar words from *Marsh*: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those

258. *See id.* at 907.

259. *Id.* at 911.

260. United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 910 (1975).

261. Sam Andrews' Sons v. Ag. Lab. Rel. Bd. (United Farm Workers), 47 Cal. 3d 157, 189 (1988).

262. 26 Cal. 4th 1013 (2001).

263. Fashion Valley Mall v. N.L.R.B., 42 Cal. 850, 862-63 (2008).

who use it."[264] *Fashion Valley* rejects, as valid in applying the California Constitution, the U.S. Supreme Court's narrowing of *Marsh* in *Lloyd*.[265]

*Fashion Valley* affirms earlier California free speech decisions,[266] including in *In re. Hoffmann*,[267] *In re. Lane*,[268] and *Diamond v. Bland (Diamond I)*.[269] *Fashion Valley* also declines to ignore changing historical circumstances in order to undercut *Marsh*, as *Lloyd* had done by declaring the company town—and the need for constitutional protection of its residents—an "economic anomaly of the past."[270] Rather, *Fashion Valley* concluded that when history changes the ways people interact, the places and mechanisms through which rights are protected must also change.[271] *Fashion Valley* confirms the continuing relevance, in a free speech analysis under the California Constitution, of *Logan Valley*. Specifically, it quotes approvingly *Logan Valley*'s recognition that unless the law recognizes changing historical circumstances, it would be possible for businesses to "largely immunize themselves from . . . criticism by creating a cordon sanitaire of parking lots around their stores."[272] *Fashion Valley*'s attentiveness to historical change could be useful in the context of access rights for the exploding population of H-2A workers living in employer-provided housing.

Though *Pruneyard* focused on speech rights at a large shopping mall, it cited extensively from *Agricultural Labor Relations Board v. Superior Ct. (Pandol)*,[273] a case affirming union organizers' right to access farmworker housing (discussed below). *Pruneyard* quotes *Pandol* to warn of the danger of an exaggerated elevation of property rights: "'Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, the safety, the moral, or the welfare of others.'"[274] It cites *Pandol*'s point that "[a]ll property is held subject to the power of the government to regulate its use for the public welfare."[275]

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264. *Id.* at 859-60 (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)).

265. *Id.* at 862 (citing Pruneyard v. Robins, 23 Cal. 3d 899, 910 (1979)); Diamond v. Bland, 11 Cal. 3d 331, 340 (1974) (*Diamond II*) (Mosk, J., dissenting).

266. 42 Cal. at 859-60.

267. 67 Cal. 2d 845 (affirming right to handbill in station as long as it did not interfere with use of the station).

268. 71 Cal. 2d 872 (1969) (affirming the union's right to distribute handbills on a privately owned sidewalk).

269. 3 Cal. 3d 653 (1970) (*Diamond I*) (extending the right unions to expressive activity on private property, even when the speech was unrelated to the property itself).

270. Lloyd Corporation v. Tanner, 407 U.S. 551, 562 (1972).

271. *See* 42 Cal. at 858.

272. *Id.* at 860 (quoting Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 324-25 (1968)).

273. Ag. Lab. Rel. Bd. v. Superior Ct. (Pandol), 16 Cal.3d 392, 392, 409 (1976).

274. 42 Cal. at 906 (quoting *Pandol* at 404).

275. *Id.* at 905 (quoting *Pandol*, 16 Cal. 3d 403).

The value of the *Pruneyard* line of cases to worker housing access questions is not clear. The extensive use of *Pandol*, concerned with statutory protection for labor organizer access to labor camps, in *Pruneyard*, concerned with constitutional free speech protections, suggests the relevance of *Pruneyard* to employer housing access rights by people unaffiliated with a union. Nonetheless, given the vast differences between busy supermarkets and remote worker housing, an argument that *Pruneyard* applies to housing access cases might be difficult to make.[276] Nonetheless, the broader point of *Pruneyard* and its progeny—that California's free speech protections are greater than those afforded by the First Amendment, and that the Supreme court's broader readings of First Amendment protections remain valid as to California protections, notwithstanding the contraction of the state action doctrine in *Lloyd* and *Hudgens*—may lend support for a California constitutional claim in addition to or instead of a First Amendment claim.

*Golden Gateway Center*, decided seven years before *Fashion Valley*, examines *Pruneyard*'s applicability to an exclusive apartment tower's decision to bar tenants' association members from leafleting neighbors by slipping flyers and newsletters under apartment doors, posting them on bulletin boards, and hanging them from doorknobs (but not ringing a doorbell or knocking on a door).[277] None of the three opinions in *Golden Gateway* commanded a majority, and so the opinion does not impose a state action limitation on the California Constitution's free speech protections.[278] *Golden Gateway*'s three-justice lead opinion held that the California Constitution's free speech clause contained a state action limitation, and "no state action exists here because the Complex is not freely open to the public." Thus, the apartment complex could ban leafleting by its own tenants to each other because it remained a private actor, not constrained by the California Constitution.[279]

*Golden Gateway*'s lead opinion focuses its constitutional analysis entirely on whether a property is "freely open to the public," excluding all other criteria for establishing whether a space is a public forum subject to free speech guarantees. In using this narrow test, the opinion parts ways

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276. *See* United Farm Workers v. Superior Ct. (Buak Fruit), 14 Cal. 3d 902, 910 (1975) (finding supermarket access cases "not apposite" for evaluating free speech rights at labor housing).

277. *See* Golden Gateway Center v. Golden Gateway Tenants' Association, 107 Cal. App. 4th 1013, 1017-18 (2001).

278. *See* Albertson's Inc. v. Young, 107 Cal. App. 4th 106, 116 (2003) (analyzing *Golden Gateway* and concluding that it "provides no help" in resolving a supermarket access case, and that instead the *Robins* balancing test was appropriate); Costco Companies v. Gallant, 96 Cal. App. 4th 740, 747-48 (2002) (describing the *Golden Gateway* opinions and applying the *Robins* balancing test to a stand-alone store). Dickinson v. Wal-Mart Stores, 2002 WL 1496008 (Cal. App. 2002), unpublished, offers a similar analysis of *Golden Gateway*. *Id.* at *3-5.

279. 107 Cal. App. 4th at 1031.

with *Pruneyard* and other cases on which it purports to rely.[280] For instance, it acknowledges *Pruneyard*'s criteria as multiple: "one . . . principle emphasized by *Robins* was the public's unrestricted access to the privately owned property," and "[*Pruneyard*] emphasized, among other things, the shopping center's open and unrestricted invitation to the public to congregate freely."[281] Nonetheless, and without explanation, the lead opinion selects just one criterion as its test of "public character": "the actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public."[282] Thus, "no state action exists here," and Golden Gateway can restrict leafleting.[283]

The three-justice dissenting opinion rejects a state action requirement, and finds that the restrictions imposed by the apartment building are an unreasonable time, place and manner restriction on protected speech.[284] It evaluates the leafleting restriction using the balancing test, following the lead of *Pruneyard*: "we considered the interest in 'speech and petitioning, reasonably exercised,' and 'the role of [shopping] centers in our society' in facilitating the exercise of such rights as against the 'defendant's property rights,' emphasizing that our result, in favoring free speech, might be different if 'we . . . ha[d] under our consideration the property or privacy rights of an individual homeowner."[285] It concludes that the apartment complex's leafleting ban is not reasonable: it "fails to leave open ample alternative channels," is not narrowly tailored, and ignores the tenants' "recognized interest in receiving even unsolicited communications"—as well as the distributors' interest in sharing them.[286]

The Chief Justice concurred in the lead opinion's result on narrow grounds. His opinion found that the particular activity being limited—"the unsolicited distribution of pamphlets in the interior hallways of an apartment building that is not generally open to the public"—is not constitutionally protected whether or not the state is involved, and thus concludes that "the state action doctrine is irrelevant."[287] It counsels caution in imposing a state action requirement because of the "diverse circumstances in which the free speech clause might be implicated . . . . a private person or entity may attempt to utilize its power or authority in one sphere to censor or undermine what might be viewed as another

280. *Id.* at 1032-33.
281. *Id.* at 1032.
282. *Id.* at 1033.
283. *Id.* at 1032.
284. *Id.* at 1045, 1046.
285. *Id.* at 1049 (citations omitted).
286. *Id.* at 1049, 1050, 1052, 1053.
287. *Id.* at 1036, 1040.

individual's 'core' free speech rights. Consider a private landlord who, under penalty of eviction, precludes his or her tenants from displaying in the windows of their apartments the campaign poster of a particular political candidate."[288] A broad holding that "*all types of section 2(a) free speech claims* require state action" risks removing "any state constitutional obstacle to any such action by a landlord, union, or employer."[289]

The Chief Justice's concurring opinion stresses that the majority's judgment (that the Complex can limit the leafleting) does not touch many other expressive activities: "It is important to emphasize what we do *not* consider by or decide in this case. We do not face any effort by a landlord to ban all discourse by tenants in the closed hallways . . . . [T]he landlord's rule simply prohibits the tenants' association from leaving *unsolicited* pamphlets on or under the hallway doors of fellow tenants, or in a pile for the taking in the hallway."[290]

The central holding of *Golden Gateway*'s lead opinion has not been affirmed,[291] and subsequent treatment of the case confirms its limited precedential value. When considering appellate cases that cite *Golden Gateway*, the California Supreme Court has chosen not to cite it. In *Intel Corp. v. Hamidi*,[292] a case about an employer's claim that a former employee's bulk emails to employees constituted a trespass to chattels, the Court of Appeal cited *Golden Gateway* for its holding that the emails were not a public forum subject to a free speech guarantee, and that, moreover, the sender had alternative means of reaching his audience.[293] The California Supreme Court reversed, rejecting the trespass to chattel claim.[294] *Hamidi II* does not cite *Golden Gateway*. More importantly for our purposes, *Hamidi II* held that the injunction blocking the emails based on the trespass

288. *Id.* at 1042.

289. *Id.* at 1043.

290. *Id.* at 1041.

291. The California Supreme Court has cited *Golden Gateway* only four times since its issuance in 2001. In Fashion Valley Mall v. N.L.R.B., the dissent cites *Golden Gateway* to support overturning *Pruneyard* (42 Cal. 850, 873, 877 (2008)); in contrast, the *Fashion Valley* majority cites Gerawan Farming v. Lyons, 24 Cal. 4th 468, 486 (2000), to hold that California's Constitutional free speech protections are broader than those guaranteed by the U.S. Constitution (42 Cal. 850, 862)). Catholic Charities of Sacramento, 32 Cal. 4th 527 (2004), a contraception coverage case, cites *Golden Gateway* to affirm that the California Constitution's free speech clause "is 'more definitive and inclusive than the First Amendment.'" *Id.* at 585. Edelstein v. City and County of San Francisco, 29 Cal. 4th 164 (2002), a case involving a ban on write-in candidates, cites *Golden Gateway*'s characterization of the legislative history of the California Constitution's free speech clause. *Id.* at 179. People v. Mar, 28 Cal. 4th 1201 (2002), a criminal case involving the use of a stun belt restraint, uses a quotation from *Golden Gateway*'s plurality opinion to illustrate that "it is customary for the opinions of appellate courts to include citations to the published work of student authors." *Id.* at 1214, n.1.

292. 114 Cal. Rptr. 2d 244, 256-57 (2001) (*Hamidi I*).

293. *Id.* at 256-57.

294. Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1360, 1366 (2003) (*Hamidi II*). The Court explained that because no damages were shown, the trespass to chattel claim could not be sustained; it distinguished trespass to chattel from trespass to real property, where no damages must be shown

claim was state action subject to constitutional guarantees, and could not stand.[295] Moreover, it acknowledged that the right to refuse a communication rested not with the employer whose email system was being used, but to each employee recipient of the email.[296]

The Court of Appeal in *Barrett v. Rosenthal*,[297] an internet defamation case, refused to apply *Golden Gateway*'s state action limitation to cyberspace, and noted that websites had been held to be public for a even after *Golden Gateway*.[298] The California Supreme Court agreed with the appellate court's rejection of the *Golden Gateway* argument, holding that the website was a "public forum" for purposes of the anti-SLAPP statute; the Court did not address the question of whether or not state action was required.[299] The California Court in *Barrett II* does not cite *Golden Gateway*. Several lower court cases have cited *Golden Gateway*, with varying levels of attention to its fractured nature.[300]

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295. *Id.* at 1364.

296. *Id.* at 1365.

297. 5 Cal. Rprtr. 3d 416 (Cal. App. 2003) (*Barrett I*).

298. *Id.* at 424.

299. Barrett v. Rosenthal, 40 Cal. 4th 33, 41 n. 4 (2006) (*Barrett II*). Two federal district courts considering whether websites are public fora cite *Golden Gateway*. Buza v. Yahoo!, 2011 WL 5041174, *2 (N.D. Cal. 2011); Kinderstart.com LLC v. Google, Inc., 2006 WL 3246596, *7 (N.D. Cal. 2006) (unpublished).

300. *Golden Gateway*'s conclusion about state action, and the limited test for state action it identifies (state action can only be found if a property is freely and openly accessible to the public), appears in a number of cases addressing the right of protesters on real property. Two are fairly standard supermarket public access cases, both carefully reasoned. In *Costco Companies v. Gallant*, the Court of Appeal acknowledged *Golden Gateway*'s limited authority, and emphasized the *Golden Gateway* dissent's concern with balancing tenants' substantial interest in open communication with each other against the limited burden on the landlord. 96 Cal. App. 4th 740, 748 (2002) (*review denied*). The *Costco* court relied on *In re. Hoffman*, 67 Cal. 2d 845, 851-52 (1967), which held that anti-war protesters at a train station could be charged with trespass only if they interfered with the functioning of the station, to find that Costco had shown burdens and risks from protesters, and so could impose time, place and manner restrictions. *Costco*, 96 Cal. App. 4th at 749. The court in *Albertson's Inc. v. Young* concluded that *Golden Gateway* provided no relevant guidance for evaluating the rights of signature-gatherers who stationed themselves immediately outside the exits of a stand-alone grocery store. 107 Cal. App. 4th at 118. Specifically, the *Albertson*'s court explains: "*Golden Gateway* provides no help in resolving the dispute before us because (1) the Supreme Court was unable to reach a majority opinion in that case, (2) whether there is a state action requirement was not raised here, and (3) the facts in *Golden Gateway* are not comparable." *Id.* at 118.

Some opinions, particularly in federal court, cite *Golden Gateway* with cursory analysis, or no analysis at all, either to assert that it imposes a state action requirement on the California Constitution's free speech protection or for the "freely and openly accessible" test for establishing a public forum. A series of cases addressing the free speech claims of animal rights activists seeking to document circus animal mistreatment cite *Golden Gateway* with limited analysis. Cuviello v. City of Stockton, 2008 WL 4283260, 7 (E.D. Cal. 2008) (ignoring *Golden Gateway*'s fractured nature and citing it as establishing that the California Constitution applies to "private actors who open their lands to the public, and in so doing, resemble state actors"); Campbell v. Feld Entertainment, Inc., 2014 WL 1366581, 1 (N.D. Cal. 2014) (finding *Golden Gateway* persuasive in establishing that California's constitutional free speech protection requires state action, with a "limited exception" for the property owner who "opens his land to the public such that it becomes a public forum"); Bolbol v. Feld Entertainment, 613 Fed. Appx. 623,

Since *Golden Gateway*, the California Supreme Court has twice returned to *Pruneyard* to clarify its meaning. In neither of these cases did it cite *Golden Gateway* or consider the state action question. In *Ralphs Grocery Co. v. United Food & Com. Workers' Union Local 8*, the court considered whether expressive activity at a stand-alone supermarket enjoyed the protection of the California Constitution.[301] In explaining the proper application of *Pruneyard*, which it identified as protecting "speech in privately owned shopping centers," the Court held up two Court of Appeal cases as examples: *Albertson's*[302] and *Van v. Target Corp*.[303] Both cases established criteria for making the public forum determination required by *Pruneyard*, and the Court endorses these criteria. The Court endorses *Albertson's* holding that a shopping center could be found to be a

625 (9th Cir. 2015) (citing *Golden Gateway*'s reasoning as persuasive and concluding that "the California Supreme Court would impose a state action requirement . . . along the lines suggested in the *Golden Gateway* plurality opinion").

Other cases offer far more conclusory treatment of *Golden Gateway*, citing it, with little or no analysis, to support a claim that the California Constitution's free speech protection imposes a state action requirement, that the state action requirement can be satisfied only if the property is freely and openly accessible to the public, or both. *See* Slauson Partnership v. Ochoa, 112 Cal. App. 4th 1005 (2003) (taking the *Golden Gateway* plurality opinion's state action test as binding authority, but, because a strip mall was freely and openly accessible to the public, evaluating access rights under the balancing test of *Pruneyard*); Rezec v. Sony Pictures Entertainment, Inc., 116 Cal. App. 4th 135, 138 n. 1 (2004) (announcing, in a false advertising case, that it would apply the same free speech analysis under both the California and U.S. Constitutions, citing the *Golden Gateway* lead opinion without explanation); Thornbrough v. Western Placer Unified School District, 2009 WL 5218039 (E.D. Cal. 2009) (dismissing an employee's free speech claim because "California's free speech clause predicates a violation on state action," and citing the threshold test of *Golden Gateway*'s lead opinion without further analysis); Yu v. Univ. of La Verne, 196 Cal. App. 4th 779, 790 (2011) (asserting, without discussion, that California's constitutional free speech provision does not differ from the First Amendment in requiring state action); Bakst v. Comm. Mem. Health Sys. Inc., 2011 WL 13214315 *6 (C.D. Cal. 2011) (citing, in a case about contractual non-disparagement clauses, *Golden Gateway* for authority that California' constitutional free speech guarantees require state action); Naoko Ohno v. Yuko Yasuma, 723 F.3d 984, 999 n.16 (9th Cir. 2013) (quoting, in a case challenging judicial enforcement of a foreign money judgment, *Golden Gateway*'s claim that "judicial enforcement of injunctive relief does not, by itself, constitute state action for purposes of California's free speech clause") (*Naoko Ohno* does not cite Intel Corp. v. Hamidi, 30 Cal. 4th 1342 (2003) (*Hamidi II*), decided two years after *Golden Gateway*, in which the majority held that an injunction constituted state action); Tate v. Kaiser Foundation Hospitals, 2014 WL 176625 (C.D. Cal. 2014) (granting summary judgment on free speech claim in "the absence of state action" because the "property is not 'freely and openly accessible to the public'") (*Tate* cites both the *Golden Gateway* lead opinion and the dissent in *Albertson's*, 107 Cal. App. at 133, which it claims says "that the protections of Article I, Section 3 are limited to public fora"); HIQ Labs v. LinkedIn Corp., 273 F. Supp. 3d 1099, 1116 (characterizing, in a case about internet speech, *Golden Gateway* as establishing that owners of real property may be considered state actors for free speech purposes if their property is "freely and openly accessible to the public"); H.S. v. AQUA EMPS Booster Club, 2014 WL 3362331, *6 (E.D. Cal. 2014) (citing *Golden Gateway* to hold that a different section of California's Constitution, article 1, section 7, only reaches state actors). Two cases cite *Golden Gateway* as authority that courts should not rely on dicta. Strong v. State, 201 Cal. App. 4th 1439, 1461 (2011); Parmar v. Bd. of Equalization, 196 Cal.App.4th 705, 716 (2011).

301. 55 Cal. 4th 1083, 1089 (2013).

302. 107 Cal. App. 4th 106 (Cal. App. 2003); see discussion *supra* n. 299.

303. 155 Cal. App. 4th 1375 (2007)

public forum if it invited "'the public to meet friends, to eat, to rest, to congregate, or to be entertained at its premises,'" or if the design of its "entrance area" made it "'a place where people choose to come and meet and talk and spend time.'"[304] The *Ralphs* court also endorsed *Van*'s reliance on whether or not "the stores are uniformly designed to encourage shopping as opposed to meeting friends, congregating, or lingering."[305] The Court concludes, "to be a public forum under our state Constitution's liberty-of-speech provision, an area within a shopping center must be designed and furnished in such a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation, not merely to walk to or from a parking area, or to walk from one store to another, or to view a store's merchandise and advertising displays."[306]

The criteria endorsed in *Ralphs* as a test of whether or not a space is a public forum are limited, by the language of the *Ralphs* opinion, to shopping centers.[307] However, all are criteria easily satisfied by employer-provided farmworker housing on employer land, which necessarily invites its residents to linger, eat, talk, and congregate—indeed, they have no other place to carry out these activities.[308]

## IV. CONCLUSION AND AVENUES FOR VINDICATION OF RIGHTS

California law compels the conclusion that legal aid outreach workers, among other service providers, have a right to contact agricultural workers in employer-provided housing at reasonable times of day: a trespass charge against them cannot stand.

Advocates may choose to vindicate this right through litigation, inviting a trespass charge and challenging it in court. The law is in their favor. Arguments based on the California Constitution and California state and common law offer the strongest support for making explicit the right of workers to choose who they speak to in their homes, and third parties' right to approach them. Caselaw establishes that the U.S. Constitution guarantees visitors the right to knock at the farmhouse door, but California's constitutional free speech and privacy protections, along with common law tenant protections and statutory protections of workers' rights, offer more robust support for access rights. Particularly given the U.S. Supreme Court's narrowing of *Marsh*, and the current attitude of the Court,

304. *Ralphs*, 55 Cal. 4th at 1093.

305. *Id.*

306. *Id.*

307. *Id.* at 1091.

308. *See id.* at 1092-93.

particularly where worker rights are at stake,[309] the case under California law is clearer and stronger.

Other avenues for expanding access rights may support this effort, or perhaps obviate the need for a court challenge. In several states, attorneys general have provided legal guidance clarifying access rights, and service providers can bring such guidance with them when they approach agricultural workers in their employer-provided homes. Opinion letters from the attorneys general of Virginia, New York, Maryland, Iowa, and Michigan are particularly clear in their delineation of access rights, and reach conclusions consistent with California law.[310] General Counsel in North Carolina and attorneys general in Florida, and Oregon and have also issued guidance clarifying access rights.[311]

A formal California Attorney General opinion letter would support service organizations, providing a way to educate employers and law enforcement on the right of outreach workers to communicate with workers in their homes. *Rivero* reports that legal aid staff "carries copies of relevant legal authority that sets forth the organization's right to conduct outreach"; the clash leading to the case resulted when a Maryland officer refused to read an electronic version of the Maryland Attorney General letter—had the outreach workers brought a paper copy, the conflict might have been avoided.[312] A Farmworker Legal Services of New York worker calls the New York Attorney General Opinion one of her outreach "essentials."[313] An attorney general opinion letter would also assist the Employment Development Department in reviewing employers' H-2A applications, providing clear direction to flag and reject contracts that include no-visitor clauses or other access and associational limitations for workers in employer-provided housing.[314] Legal services organizations may be able to

309. *See*, *e.g.*, Janus v. Am. Fed'n of State, Cty. & Min. Emps., Council 31, 138 S.Ct.2448, 2478 (holding First Amendment invalidated public-sector union open shop requirement); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619, 1623 (2018) (holding that the NLRA's collective bargaining guarantees do not invalidate arbitration agreements barring class actions).

310. 2019 Op. Att'y Gen. Va 18-044 (Feb. 22, 2019); 1979-80 Va. Op. Att'y Gen. 391 (Aug. 9, 1979); 1991 Op. Att'y Gen. NY 23; 67 Op. Att'y Gen. Md. 64 (Jul. 19, 1982); 73-10-11 Op. Att'y Gen. Iowa (Oct. 15, 1973); Op. Att'y Gen. Mich. (April 13, 1971).

311. North Carolina General Counsel letter, *supra* n.155; 1978 Fla. Op. Att'y Gen. 166 (April 26, 1978); 36 Or. Op. Att'y Gen. 332 (Feb. 5, 1973).

312. *See Rivero*, 259 F. Supp. 3d at 338. The staff had a paper copy of the Virginia Attorney General letter, but not the Maryland letter. *Id.*

313. Lori Nessel and Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging Barriers to Inclusion*. LAW & INEQUALITY 13.99 (1994), 101.

314. The Attorney General has articulated arguments supportive of access rights, albeit in the workplace access context. In the Appellee's Reply Brief in the appeal before the Ninth Circuit in *Cedar Point Nursery v. Shiroma*, the California Attorney General argues that PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), which affirmed California's ability to grant greater constitutional protections for access than those guaranteed by the First Amendment, supports a holding that a rule guaranteeing labor organizers access to worksites is a "permissible regulatory exception" to the right to

advocate for the issuance of a favorable opinion letter, even if the opinion is requested by a third party.[315]

Legislation could also articulate clearer protections for farmworker housing access rights. Modifying the trespass statute offers one statutory fix. Trespass statutes in some states identify an exception to trespass laws for those accessing agricultural housing, as in Maryland.[316] A similar express exception to California's trespass law could provide clarity. Alternatively, statute or regulation could expressly guarantee access. In several states, statutes or regulations do not merely shield visitors to workers from criminal charges. Massachusetts provides particularly clear, detailed and broad protection, guaranteeing visitor access to farm labor camps, subject to workers' rights to terminate the visit, at least four hours a day on working days, more hours on rest days, and exempting some, including those providing legal and medical services, from all limitations on access.[317] Pennsylvania and Wisconsin offer more general statutory protection, vesting the right to grant or deny access in the workers and limiting an employer's ability to impose access restrictions.[318] Wisconsin and Florida statutes specify that no physical barrier may impede access to worker housing.[319] The change could be memorialized in changes to the

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exclude. Br. of Def.-Appellee at 15-16, *Cedar Point Nursery v. Shiroma*, No. 16-16321 (February 3, 2017). The brief also discusses the interplay between state trespass law and constitutional guarantees, noting that "as a general proposition, '[t]he right of employers to exclude organizers from private property emanates from state common law,' and California does not create this right" for property owners. *Id.* at 25, citing *Cedar Point I*, 2016 WL 3549408 at *5 n.2 and Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 217 n.21 (1994). The distinction recalls the reasoning of *Shack*, which found greater protection for tenant workers under state property protections than under the constitution. *See* State v. Shack, 58 N.J. 297, 302-03 (N.J. 1971). *See also* Cedar Point v. Shiroma, 2019 WL 2017196, *6 (9th Cir., May 8, 2019) (citing *Pruneyard* in its affirmance of dismissal of grower's claim that labor access rules constituted an unconstitutional taking).

315. For instance, in Virginia in 2018, when a sheriff sought formal guidance from the Attorney General, a legal aid organization deepened the discussion by submitting a white paper describing access problems and the legal context, by identifying specific issues not addressed in a 1979 Virginia attorney general opinion, and by providing proposed solutions. *See* Legal Aid Justice Center, *supra* n.4, *passim*.

316. Md. Code, Crim. Law § 6-406.

317. tit. 105 Mass. Code Regs. §§ 425.001-425.900. The regulations were upheld as constitutional. *Consol. Cigar Corp.*, 372 Mass. at 858. A California court is likely to reach the same conclusion about a similar California regulation. *See* San Diego Nursery Co. v. ALRB, 100 Cal. App 3d 128, 135, 143 (Cal. App. 1979) (upholding as constitutional a trespass exception for government employees entering employer grounds without consent for a limited purpose, but finding that the agency must follow formal rulemaking procedures).

318. tit. 43 Pa. Stat. § 1301.403 ("The entry to egress from the premises of any seasonal farm labor camp shall not be denied . . . (2) to guests of farm workers or persons working under the auspices of private organizations whose primary objective on entering the premises is the health, safety, welfare or dignity of seasonal farm workers"); Wis. Stat. § 103.925 ("[a]ny worker shall have the right to decide who may visit with him or her in his or her residence. No person other than the resident may prohibit, bar or interfere with . . . the access to or egress from the residence of any person, either by the erection . . . .of any physical barrier, or by physical force or threat of violence").

319. Wis. Stat. § 103.925; tit. 19 Fla. Stat. § 381.00897.

Employee Housing Act,[320] which enables "regulations relating to use, maintenance, and occupancy" of all employee housing, and which currently mentions occupants' legal rights at several points.[321]

A statute clearly delineating access rights would make it easier for both farmworkers and third party organizations to vindicate workers' legal rights and obtain or provide needed services. In contrast, the litigation and attorney general opinion letter options leave farmworkers reliant on sufficient outreach efforts by particularly well-informed, well-staffed organizations who know both the law and the location of the housing facilities. However, care should be taken in drafting and advancing such legislation. Access rights, with their foundation in the California Constitution and existing caselaw, are fundamental, and should not be bartered away in political horsetrading that could narrow rights rather than expand them.[322]

The number of H-2A workers has risen dramatically, particularly as freer forms of migration have been choked off. A declining possibility of permanent migration brings with it a widening gulf—psychological, cultural, and legal—between communities around labor camps and workers within them. This would be the case even if employers did not enforce a "cordon sanitaire" around the housing they provide.[323] Not coincidentally, the rise in H-2A work and the increasing (enforced) isolation of migrant workers comes as organized labor has lost power and agricultural wages have declined. Unchecked abuse of H-2A workers harms not only those workers, but also resident workers whose ability to enforce workplace protections and exercise bargaining power shrink when employers can rely on a voiceless, captive workforce. In these circumstances, and in a context where employers feel emboldened in their exploitation of workers, the protection of the limited legal rights of H-2A and other agricultural workers becomes more pressing, and the need to contact them in their homes in order to vindicate those rights even more essential.

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320. Cal. Health & Safety Code § 17000-17062.5

321. *See, e.g.,* Cal. Health & Safety Code § 17031.5.

322. A relevant example is provided by California Civil Code section 1942.6. Enacted in 2000, the provision exempts from trespass liability those who enter a property to provide information about tenants' rights "upon the invitation of an occupant." Cal. Civ. Code 1942.6. Despite the provision's express disclaimer that it is "declaratory of existing law" and that it shall not be "construed to enlarge or diminish the rights of any person under existing law," the focus on invitees both mischaracterizes existing law and provides a purchase point for property owners to argue that tenants cannot be approached by third parties. *See id.* Even the modest protections of 1942.6, which was introduced by tenants' rights advocates in response to "altercations . . . where invited tenant advisors or organizers were prevented access or were arrested and removed as trespassers," was opposed by landlords. Cal. Bill Analysis, Senate Floor, 1999-2000, Regular Session, Senate Bill 1098 (August 31, 1999).

323. *See Fashion Valley*, 42 Cal. at 860.