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Get off my Property: SCOTUS Limits Union Access to Employer Premises

On June 23, 2021, the U.S. Supreme Court struck down as unconstitutional a California regulation that allowed union organizers access to an agricultural employer's private property, holding such to amount to a per se physical taking violative of the Fifth and Fourteenth Amendments to the U.S. Constitution. The decision, *Cedar Point Nursery v. Hassid,* ___ U.S. ___, ___ L.Ed.2d ___, 141 S.Ct. 2063 (2021), authored by Chief Justice John Roberts and joined by the Court's conservative majority, limits the ability of governmental entities to mandate that property owners allow labor organizations access to their property generally closed to the public. The Court's full decision can be found at www.supremecourt.gov/opinions/20pdf/20-107_ihdj.pdf [https://www.supremecourt.gov/opinions/20pdf/20-107_ihdj.pdf] .

California's Access Regulation and Procedural History

The California labor regulation at issue granted union organizations a "right to take access" to an agricultural employer's property to solicit support for potential unionization. 141 S.Ct. at 2066. Specifically, the regulation mandated agricultural employers to allow union organizers onto their property for up to three hours per day, 120 days per year. *Id.* To access the property, a labor organization was required to first file written notice with the California Agricultural Labor Relations Board, which then provided the right to enter the employer's property to meet and speak with employees, subject to certain rules and restrictions. 141 S.Ct. at 2069. Interference with a union's right of access to an employer's property could constitute an unfair labor practice and subject the employer to sanctions. *Id.*

Consistent with the California regulation, labor organizers from the United Farm Workers attempted to access properties owned by the Cedar Point Nursery and Fowler Packing Company. *Id.* The two agricultural growers subsequently filed suit seeking to enjoin enforcement of the access regulation on the grounds that it appropriated, without compensation, an easement for union organizers to enter their private property. 141 S.Ct. at 2070. The growers argued the access regulation constituted an unconstitutional per se physical taking of their property under the Takings Clause of the Fifth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation." 141 S.Ct. at 2071.

The district court dismissed the growers' complaint, holding that the California access regulation did not constitute a per se physical taking because it did not allow the public to access the private property in a permanent and continuous manner. 141 S.Ct. at 2070. The Ninth Circuit Court of Appeals affirmed the district court's decision, agreeing that the regulation was not a per se physical taking because it did not allow "random members of the public to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year." *Id.*

The Regulation Resulted in a Physical Taking

The Court, by a 6-3 vote, concluded that the California access regulation resulted in a per se physical taking under the Fifth and Fourteenth Amendments to the Constitution. 141 S.Ct. at 2072. Chief Justice Roberts, joined by the Court's six Justice conservative voting bloc, first noted that when the government physically acquires private property for a public use, the Takings Clause of the Fifth Amendment imposes a clear obligation to provide the owner with "just compensation." 141 S.Ct. at 2071. Alternatively, "[w]hen the government, rather than appropriating private property for itself or a third party, . . . imposes regulations that restrict an owner's ability to *use* his own property, a different [legal] standard applies." [Emphasis added.] 141 S.Ct. at 2071. When determining whether a use restriction amounts to a taking under the Fifth Amendment, the Court has previously applied the "flexible test" developed in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978), considering and balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. 141 S.Ct. at 2072. However, the Court highlighted that whenever a regulation results in a physical appropriation of property, a per se taking has occurred, thus the *Penn Central* test has no place. *Id.*

Reviewing the California access regulation, the Court held this to appropriate a right to "invade" the growers' property by labor organizers and therefore constituted a per se physical taking as opposed to a mere use restriction. *Id.* Rather than restraining the growers' use of their property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude others from their property, which is "one of the most treasured" rights of property ownership. 141 S.Ct. at 2072. The Court surveyed existing precedent to support the general principle that any government-authorized invasions of property are physical takings requiring just compensation. 141 S.Ct. at 2073 – 2074. Here, the State of California appropriated a right of access to the growers' property, allowing union organizers the right to "traverse it at will" for up to three hours per day, 120 days per year. 141 S.Ct. at 2074. The growers thus stated a viable claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments. *Id.*

Addressing the Ninth Circuit's (and dissenting opinion's) view that the access regulation did not constitute a per se physical taking because it did not allow labor organizers permanent and continuous access to the growers' property, the Court dismissed this argument as insupportable as a matter of "precedent and common sense." *Id.* First, the Court noted that it had previously held that a physical appropriation of property is considered a "taking" whether it be permanent or temporary. *Id.* The duration of an appropriation, however, impacts only the amount of compensation due to the property owner. *Id.* Second, the Court also noted that it has recognized that physical invasions of property constitute takings even if intermittent as opposed to continuous.141 S.Ct. at 2075. The fact that a right to take access may only be exercised from time to time, according to the Court, does not make it any less a physical taking. *Id.*

The Court also addressed the dissent's position that the Court's decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980), established that the California access regulation could not qualify as a per se taking. 141 S.Ct. at 2076. In *PruneYard,* the California Supreme Court upheld the right to engage in leafleting at a privately owned shopping center, which the shopping center argued had taken its right to exclude others from its property without just compensation. 100 S.Ct. at 2039. Applying the *Penn Central* factors, the *PruneYard* court held that no compensable taking had occurred. 100 S.Ct. at 2042. In *Cedar Point Nursery,* however, the Court noted that unlike the growers' property, the shopping center in *PruneYard* was open to the public, welcoming approximately 25,000 patrons per day. 141 S.Ct. at

2076. According to the Court, limitations on how a business generally open to the public may treat individuals on the premises are easily distinguishable from regulations granting a right to invade property closed to the public. 141 S.Ct. at 2077.

With respect to the dissent's concerns that treating the access regulation as a per se physical taking would endanger other state and federal governmental activities involving entry onto private property, the Court explained that this "fear is unfounded." 141 S.Ct. at 2078. First, the Court noted that its holding does nothing to impact the distinction between "trespass" and "takings," as isolated physical invasions, not done pursuant to a granted right of access, are properly treated as individual torts rather than appropriations of a property right. *Id.* Second, according to the Court, many government-authorized physical invasions of property will not amount to takings because they are consistent with longstanding background restrictions on property rights. 141 S.Ct. at 2079. Specifically, the government does not take a property interest when it merely asserts a "pre-existing limitation" on the owner's title (*e.g.,* the government requiring a landowner to cure a nuisance on their property, searches on property consistent with the Fourth Amendment, etc.). *Id.* Third, the Court concluded that the government still has the right to require property owners to cede a right of access as a condition of receiving certain benefits without causing a taking (*e.g.,* government health and safety inspection regimes for permits, licenses, etc.). *Id.*

The Court therefore concluded that because the California access regulation granted union organizations a right to invade the growers' property, this constitutes a per se physical taking under the Fifth and Fourteenth Amendments. The Court remanded the case for further proceedings consistent with its opinion. 141 S.Ct. at 2080.

Key Takeaway

The *Cedar Point Nursery* holding generally stands for the proposition that any government-sanctioned physical invasions of private property are now compensable takings under the Takings Clause of the Fifth Amendment, subject to limited exceptions. As such, any future effort by governmental entities to mandate labor organizations be provided access to an employer's private property for purposes of organizing employees will be considered a per se taking and thus the employer/property-owner must be appropriately compensated for the invasion of their property.

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