

## FALL 2021 NEWSLETTER

### LAND USE, ZONING and REGULATORY TAKING

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#### UNITED STATES SUPREME COURT

**Cedar Point Nursery v. Hassid, \_\_\_U.S.\_\_\_ , No. 20-107 (June 23, 2021)**

**Summary: This is a case pitting an agricultural employer’s private property rights against an agricultural employee’s rights to freedom of association and self-organization under California law. The employer’s property rights prevailed.**

The California Agricultural Labor Relations Board promulgated a regulation that granted labor organizations a “right to take access” to an agricultural employer’s property in order to solicit support for unionization (“access regulation”). The access regulation mandates that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year.

Organizers from the United Farm Workers sought to take access to property owned by two growers, Cedar Point Nursery and Fowler Packing Company. The growers filed suit in federal district court against several Board members in their official capacity seeking to enjoin enforcement of the access regulation on the grounds that it appropriated without compensation an easement for union organizers to enter their property and therefore, constituted an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments.

The district court denied the growers’ motion for a preliminary injunction and dismissed the complaint holding the access regulation did not constitute a *per se* taking because it did not allow the public to access their property in a permanent and continuous manner. In the court’s view, the regulation was instead subject to evaluation under the multifactor balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) which the growers had made no attempt to satisfy. The Court of Appeals for the Ninth Circuit in a divided opinion affirmed the district court and a petition for rehearing en banc was denied. The Ninth Circuit identified three categories of regulatory actions in takings jurisprudence and found the access regulation was not a *per se taking* but rather the type of regulatory action that must be evaluated under *Penn Central*. The growers appealed and the Supreme Court granted certiorari.

In a 6-3 opinion, the Supreme Court found that California’s access regulation constitutes a *per se* physical taking and the government must pay the employers. The Court discussed the Takings Clause of the Fifth Amendment which prohibits the government from physically acquiring private property for a public use without providing the owner just compensation. The Court assesses such physical takings using a *per se* rule: The government must pay for what it takes. The Respondents argued that the Court should view the access regulation as a restriction on the employer’s ability to use their property. A different standard applies when the government, rather than appropriating private property for itself or a third party, instead imposes regulations restricting an owner’s ability to use its property. So called “use restrictions” are

generally not considered *per se* takings, and are subject to a more deferential analysis to determine whether the owner is entitled to just compensation. To determine whether use restrictions amount to a taking, courts have generally applied the flexible approach set forth in *Penn Central*, considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. But when the government physically appropriates property, *Penn Central* has no place—regardless whether the government action takes the form of a regulation, statute, ordinance, or decree.

The Court rejected Respondent’s position finding that the access regulation appropriates a right to invade the growers’ property and therefore constitutes a *per se* physical taking. Rather than restraining the growers’ use of their own property, the regulation appropriates for the enjoyment of third parties the owners’ right to exclude others from the property. The right to exclude is a fundamental element of the property right. Because the access regulation appropriates a right to physically invade the growers’ property—i.e., to take access, it constitutes a *per se* physical taking under the Court’s precedents.

The Court dismissed the view that the access regulation cannot qualify as a *per se* taking because it does not allow for permanent and continuous access to property. The Court held that a physical appropriation is a taking whether it is permanent or temporary; the duration of the appropriation bears only on the amount of compensation due. Further, the access regulation is not transformed from a physical taking into a use restriction just because the access granted is restricted to union organizers, for a narrow purpose, and for a limited time.

The Court declined to adopt the theory that the access regulation merely regulates, and does not appropriate, the growers’ right to exclude. The right to exclude is not an empty formality that can be modified at the government’s pleasure. Further, the Court found that the Board’s fear that treating the access regulation as a *per se* taking will endanger a host of state and federal government activities involving entry onto private property is unfounded.

The Court’s decision was based on the fact that the growers’ private properties were not generally open to the public. Restrictions on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to access property closed to the public. Government regulations of private property rights of businesses open to the public will unlikely be deemed a *per se* taking and will be assessed under the *Penn Central* factors. The Court acknowledged that many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property, like common law privileges to access private property, and the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking.

The Court reversed and remanded the case.