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Access Denied: Supreme Court Finds California Regulation Permitting Union Access to Employer Property Constitutes An Unconstitutional Taking

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In a 6–3 decision, the U.S. Supreme Court held on June 23, 2021 that a California regulation granting labor organizers the "right to take access" to agricultural employers' private property to solicit union support violated the Takings Clause of the U.S. Constitution. *See* *Cedar Point Nursery et al. v. Hassid et al.*, USSC Case No. 20–107 (June 23, 2021).

Background

Decades ago, California's Agricultural Labor Relations Board ("ALRB") promulgated a regulation that requires agricultural employers to give labor organizers access to their private property for as much as three hours per day, 120 days per year for purposes of organizing. In 2016, two agricultural employers sued the ALRB in federal court in California, seeking to prohibit the agency from enforcing the regulation because the regulation constituted a physical appropriation of private property in violation of the Constitution's Taking Clause, which precludes the government from taking private property "without just compensation."

The district court, however, rejected this argument, holding that because the regulation did not "allow the public to access [the Employers'] property in a permanent and continuous manner for whatever reason," it did not amount to an unconstitutional physical taking. On appeal, a split Ninth Circuit panel affirmed the district court's decision, noting that the regulation neither allowed the public to "unpredictably traverse" the employers' private property "24 hours a day, 365 days a year," nor "completely deprive[d]" the employers of all economically beneficial use of their property. After the Ninth Circuit denied their petition for re-hearing *en banc*, the employers appealed to the Supreme Court, which granted *certiorari*.

Holding

The Supreme Court reversed the Ninth Circuit, reasoning that because the right to exclude third parties from private property "is 'one of the most treasured' rights of property ownership," the California regulation requiring agricultural employers to allow union organizers private-property access constituted a clear physical appropriation. In such cases, because the physical appropriation of private property is so clear, the Court "use[s] a simple, *per se* rule: The government must pay for what it takes." The Court then distinguished *PruneYard Shopping Center v. Robins*—a 1980 case in which the Court *rejected* the argument that state protection of leafletting in a privately owned shopping center represented an unconstitutional taking—explaining that, unlike the agricultural employers' private property, the shopping center in *Pruneyard* "was open to the public, welcoming some 25,000 patrons a day." *See* 447 U.S. 74. Notably, the Court also implied that the narrow exception enjoyed by unions under current federal labor law—which allows non-employee organizers a right of access to employers' private property when employees are otherwise "beyond the reach of reasonable union efforts to communicate with them"—could similarly prove to be an unconstitutional taking, if challenged.

Potential Impact of the Decision

For the parties, the main question left open by the Supreme Court's decision is, what is the appropriate remedy for the unconstitutional taking here? In other words, should the property owners be granted injunctive relief, as they requested, and/or should the property owners be compensated for the access granted to organizers? And if so, how much? The Court remanded the case to the federal district court to handle this question.

This case is interesting for management- and union-side labor lawyers alike because the regulation at issue provided for a union's right to access employer property, directly impacting the traditional labor-management relationship. What is particularly unique about this case is that state and local labor laws are usually challenged on preemption grounds (*i.e.*, the aggrieved party argues the state or local regulation is preempted because such conduct is arguably protected or prohibited by federal labor law). Here, however, the law did not face a preemption challenge—likely because agricultural employers fall outside the NLRA's scope. Depending on the facts, the potential avenue for redress under the Takings Clause could encourage parties to challenge similar state or local regulations that grant third parties access to private property.

Only time will tell, but on balance, this decision's potential effect on labor-management relations seems limited for at least four reasons:

- ***First***, while California agricultural employers are no longer required to grant labor organizers access to their private property (unless the state provides "just compensation"), this change applies *only* to employers in *just one industry* in *just one state*—nothing more.
- ***Second***, according to the *Wall Street Journal*, even though California has about 16,000 agricultural employers, union organizers have recently invoked their right to access in just a few dozen instances each year.
- ***Third***, if the State of California opts to keep mandating private-property access for union organizers by providing agricultural employers with "just compensation," there is no guarantee a windfall will result for agricultural employers, particularly if "just compensation" is determined to be nominal.
- ***Finally***, even the Court's suggestion that the "highly contingent" right-of-access current federal labor law affords non-employee union organizers (when employees are beyond "reasonable" communication efforts) could similarly represent an unconstitutional taking seems unlikely to prove consequential. Indeed, because this right of access is limited to extreme situations when employees live or work on highly remote, employer-owned properties (such as logging camps or fish canneries), fact patterns that could enable such a challenge, as a practical matter, would seem few and far between. And *even if* such a fact pattern did arise—ultimately enabling a successful challenge to the exception—because the exception is so limited, it would naturally impact very few workplaces.

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