Asher, Gittler & D'Alba, Ltd.
Release: Volume 42 No. 34

SCOTUS SAYS UNION ACCESS IS PER SE TAKING

In June of 2021, the US Supreme Court issued a decision in *Cedar Point Nursery v. Hassid*, which held that the State of California's Agricultural Labor Relations Act's guarantee to union organizers of limited, temporary access to agricultural workplaces to speak with employees was a taking of public property without just compensation. The Supreme Court had passed on the issue in 1976, finding that there was not a substantial federal issue implicated by the Act. The majority of the current court held that the access granted under the Act was a "per se" taking, an appropriate of property that conflicts with the property owner's right to exclude. The decision is yet another blow to organized labor from the Court, and its ramifications could extend far beyond the organized labor realm.

Under the Constitution's Fifth Amendment, there are two types of takings, "per se" and "regulatory takings." Per se takings are considered a major intrusion of private property—typically those that deprive property of all economically beneficial or productive use or constitute a permanent physical occupation. In such cases, a property owner can automatically demand compensation or, if denied payment, block the law. Regulatory takings are minor restrictions on property, like zoning ordinances, and are much harder for a property owner to win when challenging. Even if the owner wins a challenge, the government has more flexibility in providing compensation.

Under the Court's *Cedar Point* decision, the definition of per se takings has been expanded to include even a law that temporarily limits a property owner's right to exclude, since in this case, the organizers were only on the property for three hours at a time (the hour before work, the hour after work, and at the employee's lunch break), at most 120 days a year. The Court held that anytime a law or regulation allows a third party to "physically invade" the property, regardless of time period, the government must either compensate owners to cease the "taking." As the dissent pointed out, this ruling does not fit with the Court's precedent regarding a temporary physical appropriation of property that would qualify as a per se taking. It also noted the expansive reach of the majority's opinion in this case could upend many areas of law, beyond just organizing farm workers.

The reasoning of the majority's holding in *Cedar Point* has broad implications. It guts the ability to organize in the agriculture work setting, where working conditions have long been hazardous at best and life-threatening at worst with incredibly low wages. In the broader labor and employment context, the government can currently send inspectors in to ensure work place health and safety and compliance with civil rights laws. If unions are forced to pay for access to workers at $50 per takings, as Justice Coney-Barrett suggested at oral argument, access to employees would quickly become economically untenable. In non-employment contexts, the government can conduct food safety inspections, home safety inspections, even underground mine inspections. The Court attempted to limit the expansiveness of its ruling by stating that [t]he government may require property owners to cede a right of access as a condition of receiving certain benefits, such as a license to operate a business,

so long as that condition "bears an 'essential nexus' and 'rough proportionality' to the impact of the proposed use of the property." However, the scope of this carve out is hard to determine. If the government can require an agriculture company to allow food inspectors on site as a condition of business under the Court's carve out, could the government also require access for union organizers as a condition of employing workers? Future legal challenges regarding government actions and per se takings should be expected under the Court's reasoning in this case. However, clear from the start, is the 6-3 Supreme Court has delivered another blow to workers and their right to organize.

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Dated: July 21, 2021

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