GIBSON DUNN

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U.S. SUPREME COURT REAFFIRMS LIMITS TO THE GOVERNMENT'S ABILITY TO MANDATE PUBLIC ACCESS TO PRIVATE PROPERTY

To Our Clients and Friends:

On June 23, 2021, the U.S. Supreme Court held 6-3 that a California regulation granting labor organizations a right of access to agricultural employers' property to solicit support for unionization, constitutes a "per se" physical taking under the Fifth Amendment. Finding that "the regulation here 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's decision in *Cedar Point Nursery v. Hassid* arguably signals an expanded definition of physical takings which potentially could encompass additional government regulations. The Court's analysis, however, was strongly influenced by the relative intrusiveness and persistence of the intrusions authorized by the California regulation before it—which the Court analogized to a traditional "easement"— and which it distinguished from more limited tortious intrusions akin to trespasses and from traditional health and safety inspections, neither of which raise takings issues. It is therefore too soon to know whether *Cedar Point* will markedly alter takings jurisprudence.

I. Background

The California Agricultural Labor Relations Act of 1975 grants union organizers a right to take access to the property of agricultural employers for the purposes of soliciting the support of agricultural workers by filing written notice with the state's Agricultural Labor Relations Board and providing a copy of the notice to the employer. Under the regulation, agricultural employers must allow the organizers to enter and remain on the premises for up to three hours per day, 120 days per year. Agricultural employers who interfere with the organizers' right of entry onto their property may be subjected to sanctions for unfair labor practices.

In 2015, organizers from the United Farm Workers sought entry into Cedar Point Nursery and Fowler Packing Company without providing written notice. After the organizers entered Cedar Point and engaged in disruptive behavior, Cedar Point filed a charge against the union for entering the property without notice; the union responded with its own charge against Cedar Point for committing an unfair labor practice. The union filed a similar charge against Fowler Packing Company, from which they were as been blocked from accessing altogether.

The District Court dismissed the employers' complaints, rejecting their argument that the regulation constituted a per se physical taking. The Court of Appeals affirmed, evaluating the claims under the multi-prong balancing test that applies to use restrictions. The U.S. Supreme Court disagreed with the lower courts and reversed, finding that the regulation did qualify as a per se physical taking because it granted a formal entitlement to enter the employers' property that was analogous to an easement, thereby

appropriating a right of access for union organizers to physically invade the land, and impair the property owner's "right to exclude" people from its property.

II. Issues & Holding

The U.S. Constitution requires the government to provide just compensation whenever it effects a taking of property. Under a straightforward application of takings doctrine, just compensation will always be required when the government commits a per se physical taking by physically occupying or possessing property without acquiring title. Takings claims arising from regulations that restrict an owner's ability to use their property are less clear-cut. Such claims will be evaluated under a multi-prong balancing test, and just compensation is only required if it is determined that the regulation "goes too far" as a regulatory taking.

The outcome of this particular case turned on whether the Court viewed the California regulation as a per se physical taking, for which just compensation generally is required, or as a "regulatory" taking, the doctrine applied to use restrictions and under which compensation is required only if the restriction "goes too far." The Court found that the California access provision qualified as a per se physical taking because it did not merely restrict how the owner used its own property, but it appropriated the owner's "right to exclude" for the government itself or for a third party by granting organizers the right physically to enter and occupy the land for periods of time. Under the Court's holding, the fact that the physical appropriation arose from a regulation was immaterial to its classification as a per se taking. As the Court explained, although use restrictions are often analyzed as "regulatory takings," "[t]he essential question is not whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or ha instead restricted a property owner's ability to use his own property."

The Court supported its holding with past takings jurisprudence. Under the landmark case *Loretto v. Teleprompter Manhattan CATV Corp.*, any regulation that authorizes a permanent physical invasion of property qualifies as a taking. 458 U.S. 419 (1982). The Court clarified that *Loretto* did not require a finding that a per se physical taking had not occurred since the invasion was only temporary and intermittent rather than permanent and ongoing, because the key element of a taking under *Loretto* is the physical invasion itself. While the duration and frequency of the physical invasion may bear on the amount of compensation due, it does not alter its classification as a per se taking. By authorizing third parties to physically invade agricultural employers' property, the California regulation amounted to the government having taken a property interest analogous to a servitude or easement, and such actions have historically been treated as per se physical takings. The Court also made clear that a physical invasion need not match precisely the definition of "easement" under state law to qualify as a taking.

The Court also considered the seminal case of *PruneYard Shopping Center v. Robins*, in which the California Supreme Court used the multi-factor balancing test to find that a restriction on a privately owned shopping center's right to exclude leafleting was not a taking. 447 U.S. 74 (1980). The Court pointed out that unlike the California agricultural property, the shopping center in *PruneYard* was open to the public. Finding a significant difference between "limitations on how a business generally open to the public may treat individuals on the premises" and "regulations granting a right to invade property

closed to the public," the Court rejected the argument that *PruneYard* stood for the proposition that limitations on a property owner's right to exclude must always be evaluated as regulatory rather than per se takings.

Finally, the Court confirmed that its holding would not disturb ordinary government regulations. The Court noted that isolated physical invasions are properly analyzed as torts (trespasses), and not takings, that many government-authorized restrictions simply reflect longstanding common limitations on property rights (such as ruled requiring property owners to abate nuisances), and, most importantly, that its analysis would not affect traditional health and safety inspections that require entry onto private property will generally not constitute a taking. Such inspections are generally permitted on the theory that the government could have refused to license the commercial activity in question, and that an access requirement is thus proportional to that "benefit" and constitutional.

III. Takeaways

The decision does not expand the scope of per se takings to encompass regulations which merely restrict the use of property without physically invading the land. Legislative restrictions that do not involve a physical invasion will still be evaluated under the multi-prong balancing test before just compensation is required. This decision does not alter the legality of certain categories of government-authorized physical invasions, such government health and safety inspections. It is however a reaffirmation that there are limits to the government's ability to mandate public access to private property.

The following Gibson Dunn attorneys prepared this client update: Amy Forbes.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the author, or any of the following leaders and members of the firm's Land Use and Development or Real Estate practice groups in California:

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