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PERSPECTIVE

Justices wrestle with line drawing in big property rights case

By Bryan W. Wenter

At 5:00 a.m. in the summer of 2015, during the height of California's strawberry harvesting season, union activists entered Cedar Point Nursery's property under the authority granted by a California regulation that allows union organizers to enter the property of agriculture businesses for three hours at a time, 120 days per year, to recruit potential new members. The organizers entered the trim sheds with bullhorns in hand, distracting and intimidating hundreds of Cedar Point employees who were in the midst of preparing young strawberry plants for shipment.

For three consecutive days during the same summer, the organizers also attempted to enter the property of Fowler Packing Company, a family-owned grower and shipper of fresh produce. Fowler denied access and was charged with violating the access regulation.

In response to the disruption of their businesses, Cedar Point and Fowler challenged California's antiquated regulation as violating the Constitution's Fifth Amendment, which bars the government from taking private property without compensation. The case — *Cedar Point Nursery v. Hassid* — involves the fundamental question whether the government must pay a property owner when it takes a temporary easement on private property to facilitate union organizing activities. A 2-1 panel of the 9th U.S. Circuit Court of Appeals held that allowing union organizers access to agricultural employees on employers' private property is governed by multi-factor regulatory takings standards and is not a per se categorical taking. *Cedar Point Nursery v. Shiroma*, 2019 DJDAR 3857 (2019).

The Supreme Court heard oral argument in the important property rights case on Monday.

Joshua P. Thompson, an attorney for Pacific Legal Foundation representing the petitioners, argued that an access easement that takes the right to enter, occupy, and use another's private property effects a per se physical taking under the Fifth Amendment. Thompson explained that the 9th Circuit "demoted" the right to exclude to just another stick in the bundle and would give per se treatment only to those rare easements that authorize continuous 24/7 occupation. Any time limitations placed on access go towards the just compensation due, according to Thompson, not whether a taking has occurred.

Michael J. Mongan, California's solicitor general, defended the regulation, arguing that it did not amount to a per se taking because the court has reserved such treatment for "extreme regulations" that are the functional equivalent of the government directly appropriating private property. Mongan explained that there are only two narrow categories of per se regulatory takings. The first is category is the Lucas category, for regulations that eliminate all economically beneficial uses. *Lucas v. South Carolina Coastal* Council, 505 U.S. 1003 (1992). The second is the *Loretto* category, for regulations authorizing a permanent and continuous physical invasion, which the court said effectively destroys the owner's rights in their property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The attorneys faced probing questions from all justices, including Justice Clarence Thomas, who once went 10 years without asking a single question during oral argument.

Justice Thomas wanted to know how the access regulation could be distinguished from routine government inspections and administrative searches. "What would be a visit," Justice Thomas asked Thompson, "that would be sufficiently reasonable that it would not violate ... the Fifth Amendment takings clause?"

Thompson responded that "any time the government undertakes its power to search, it would not be a taking. It could be an unconstitutional search under this court's Fourth Amendment jurisprudence. But, if it is an unconstitutional search, then, by definition, it cannot be a taking because the government doesn't have authority to undertake that action."

Justice Thomas was interested in the state's view of how related the opportunity to be on private property must be to the business operation to be constitutional. "For example, could you have the exact same requirement," he asked Mongran, "except during non-business hours for the property to be available for training of the National Guard ... or the state police? Since it's open property, just simply say for three hours a day, not more than 120 days a year, but certainly not to interfere with the business, the state police could train there?"

"I think that would be a stronger claim under the ad hoc inquiry," Mongan conceded. "It's a pretty substantial interference with anybody's investment-backed expectations. You don't expect your property to be a training ground for the state police. And it's going to be a substantially ... severe physical intrusion."

Justice Stephen Breyer was concerned about the slippery slope that could flow from Thompson's position and wanted to know what Thompson thought about how that position could affect the constitutionality of "dozens and dozens and dozens of statutes" that allow certain government searches and inspections. "They're searching for conditions. They're searching to see whether they'd like to belong to a union," Breyer said. "What's the difference?"

Thompson explained again that the difference is in the nature of the underlying power involved. "If it is a power that the government possessed at common law, then you do not have the right to exclude the government from undertaking that power. If it is not a power that the government possessed at common law, then, of course, you do possess the right to exclude, and when the government takes that right from you, something that it could not do at common law, it has to compensate you for taking that right."

Justice Amy Coney Barrett thought both sides had line-drawing problems and wanted to know when in the petitioner's view something becomes a physical taking to trigger the per se rule. "What if California had a regulation that permitted union

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organizers to go onto the property of your clients one hour a day, one day a year," she asked Thompson. "Is that a taking subject to the per se rule?"

Thompson didn't hesitate, responding with a simple "yes." According to Thompson, "If the government enacts a regulation that takes the property right for one hour a year with the admitted intent of occupying and appropriating that property, the compensation may be minimal, but it's still a taking."

Testing the state's position, Justice Barrett asked Mongan to explain why he thought *Penn Central*'s ad hoc inquiry would apply to a hypothetical situation involving a city law that allowed people to protest on her lawn because it's so highly visible to the traffic that's passing by. "But exactly like this one ... it says you can do it 120 days a year and three hours at a time just during rush hour. I take it, under your theory, that's not a per se taking, that would be subject to *Penn Central?" Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Mongran agreed "that would be a powerful *Penn Central* case," even though there are no Penn Central cases in which a court has found a taking where the diminution in value is less than 50 percent, and said "if there's a concern that courts are not properly applying *Penn Central* to this type of situation, then the solution would be to take that type of case ... and clarify how it should apply."

Reading the tea leaves, it seems apparent that the court's decision will favor the petitioners. It is far more difficult to predict, however, whether the court will issue any kind of a broad, clear, or useful rule. The court has been presented with many opportunities to clarify key aspects of its muddled takings jurisprudence and repeatedly neglected to do so *(see, e.g., Bridge Aina Le'a, LLC v. Hawaii Land Use Commission*, 2021 DJDAR 1649 (Thomas, J., dissenting from denial of petition for certiorari)) or made things worse *(see, e.g., Murr v. Wisconsin*, 2017 DJDAR 6029 (2017) (Roberts, C.J., dissenting)). The court has another opportunity to provide a definitive rule in an important property rights case, and its opinion should be published before the end of the term. ■

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