

Supreme Court Holds Union Organizer Entry on Private Property Violates 5th Amendment

June 25, 2021

In a decision that may concern employers, the Supreme Court held on June 23, 2021, that a California state regulation that required agricultural employers to allow union organizers onto their property for up to three hours per day, 120 days per year, constituted an unconstitutional taking.

Chief Justice John Roberts, writing for a 6-3 majority in *Cedar Point Nursery v. Hassid*, ruled that the regulation appropriated a property owner's "right to exclude" for the benefit of the state and the unions. Because the court held the right to exclude a "most treasured right," it further held that the regulation was "per se" taking. The significance of the "per se" taking finding is that a constitutional violation is found regardless of the degree to which the regulation actually impinges on the owner's property rights and values. The dissenters would have found that the regulation was more in the nature of a regulatory taking, which would have required a showing that it "went too far" in restricting the property use.

While the decision will likely receive significant press coverage, it is unlikely to change the landscape for most private employers. Under the National Labor Relations Act, the Board and Supreme Court have already held that non-employee union organizers have no right of access to employer property absent proof that either a) employees are inaccessible to the union absent entry onto the property or b) the employer discriminates against union related persons in applying property restrictions to areas that are generally open to the public. The California regulation governed only the agricultural industry, which is exempt from regulation under the National Labor Relations Act.

The decision does leave open a number of questions regarding warrantless access to employer premises by government agencies or their designees. The majority claimed not to be changing the law in this area. However, the dissent suggested that no clear or principled line could be drawn from the majority rationale in this regard.

Should you have any questions about this decision or about union organizing campaigns, please contact the authors or your **Miller Canfield labor attorneys**.