Supreme Court Decision in Cedar Point Nursery v. Hassid May Provide Businesses New Opportunity to Challenge Regulations

Wayne J. D'Angelo

July 6, 2021

On June 23, 2021, the Supreme Court decided *Cedar Point Nursery v. Hassid*, a case involving a California regulation that requires employers to allow union organizers to enter their property to solicit members. In a 6-3 ruling along ideological lines, the Court stood with property owners and held these unwanted intrusions constituted a "taking" under the Takings Clause of the Fifth Amendment. Chief Justice John Roberts explained in his majority opinion that allowing unions to freely come onto privately held land was a violation of property owners' constitutional rights, even if unions "only" had fleeting access to the land. But this seemingly sweeping ruling declines to extend this logic to things like regulatory inspections overseen by state workers. This should serve as a powerful reminder that a conservative court is not a panacea to bureaucratic overreach, and regulatory reform must come through legislative and executive processes. This advisory breaks down the Court's opinion and explores how the ruling might provide grounds for challenging other regulations.

Majority Opinion

The central issue in *Cedar Point Nursery* was the constitutionality of a California "access regulation" that requires farm owners to allow labor union organizers to access their property in order to "solicit support for unionization." The regulation provides that union organizers can access an employer's property for up to three hours a day and 120 days per year. The farmers claimed the regulation amounted to the government taking their property without compensation, which is a violation of the Fifth Amendment.

The Fifth Amendment prohibits property from being "taken for public use, without just compensation." A typical example of a taking occurs when the government uses its power of eminent domain to seize someone's land for the purpose of building an airport or widening a road. The Fifth Amendment requires the government to pay for that land. Government regulations can also count as takings. For example, in one famous case, the Supreme Court ruled that a New York regulation requiring a landlord to install TV cables on her apartment building was a taking, since the regulation caused a "permanent physical occupation" of her property.

In *Cedar Point Nursery*, the Supreme Court ruled that the California access regulation is a taking because it forces farmers to give union organizers physical access to their property. The Court

explained that any regulation that physically "invades" a person's property automatically counts as a taking. The Court also stressed that "the right to exclude is 'universally held to be a fundamental element of the property right'" in land. Since the access regulation limits the farmers' "right to exclude" and forces them to give union organizers physical access, it takes away enough of the farmers' property rights to require compensation under the Fifth Amendment.

How Much Should The Government Pay?

One question that *Cedar Point Nursery* leaves open is what courts should do if they determine that a regulation is a taking. Since the Fifth Amendment requires the government to compensate an owner for a taking, courts usually direct the government to pay the value of the land the government took. When a taking is temporary, compensation usually equals the rental value of the property while it was taken. But in cases like *Cedar Point Nursery*, where the government limited the farmers' property rights without taking their property altogether, proving the appropriate amount of compensation is difficult. Justice Amy Coney Barrett suggested that the compensation could total as little as $50 for a union site visit. But the majority did not address this issue, leaving it to lower courts to apply different approaches.

New Path To Challenging Regulations?

The Court's holding that some temporary physical invasions are *per se* takings could make it easier for businesses to challenge other regulations that give the government or others access to private property. Indeed, one commentator called the *Cedar Point Nursery* ruling "a crushing blow to organized labor, which often relies on workplace access to safeguard workers' rights." In reality, the case is less about the right to bar unions from one's property than about the taking of one's property without the "just compensation" demanded by the Fifth Amendment. That right to compensation could be extended to other regulations. Examples include the Occupational and Safety Health Act ("OSHA"), which requires employers to give a government inspector and employee representative (often designated by a union) access to their premises. *See* 29 C.F.R. § 1903.3 (2021). However, the Court's ruling identified some important caveats that could complicate efforts to challenge OSHA and other regulations.

First, the Court said that a regulation will not rise to the level of a taking unless an owner's property is accessed multiple times. Unlike the access regulation, where union organizers entered the farmers' property year after year, one or two instances of property access will not suffice. Second, the Court clarified that the government may always access private property in exceptional circumstances, such as "in the event of public or private necessity." Finally, the government may require an owner to allow access to his land in exchange for some benefit, like a building permit. The Court explained that as long as the government's access to the property has a reasonable connection to the benefit offered, the access is not a taking. Indeed, Chief Justice Roberts seems to have no problem with this course of action. He wrote: "[T]he government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking . . . . [G]overnment health and safety inspection regimes will generally not constitute takings." This comports with longstanding precedent upholding the government's broad discretion to place reasonable restrictions on a business's activity. Litigants who hope to use the *Cedar Point Nursery* decision to challenge other regulations will need to explain why none of these three exceptions applies.

Businesses may have an opening to challenge certain regulations following the *Cedar Point Nursery* decision. Still, the exceptions in the Supreme Court's ruling will likely limit its impact, as will the

challenge of proving how much compensation the government owes.

Summer associate Micah Allred assisted in the preparation of this advisory.