PRESENTED AT

The University of Texas School of Law
26th Annual Land Use Conference
April 21-22, 2021
Austin, Texas

Cedar Point Nursery v. Hassid: The United States Supreme Court's Latest Pronouncement on Unconstitutional Takings

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I.

INTRODUCTION

In June, 2021, the U.S. Supreme Court issued its 6-3 decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), wherein it held that a California law that provided union organizers limited access to agricultural worksites was a *per se* taking based upon the proposition that any governmental grant of physical access, no matter how time-limited or functionally constrained, constitutes a *per se* taking unless one of the Court's articulated exceptions applies. Prior to this decision, the Supreme Court's tests for determining whether a case involved a regulatory or physical taking were somewhat unclear, which resulted in lower courts having to glean the appropriate takings standard to apply from a vast array of takings jurisprudence. *See* Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 Pa. St. L. Rev. 601, 628 (2014) (arguing that discerning between the two "involves subtle determinations of the nature of the property involved"). This paper will review the *Hassid* decision, which acts both as a primer on takings law under the 5th Amendment, as well as an expansion of the *per se* physical takings doctrine

II.

THE DISPUTE IN *HASSID*

The issue in this case involved a conflict between the rights of farm owners to exclude uninvited persons from their properties with the rights of labor unions to have access to farm workers "for the purpose of meeting and talking with employees and soliciting their support." Cal. Code Regs., tit. 8, § 20900(e). California law grants labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization. Cal. Code Regs., tit. 8, § 20900(e)(1)(C). It further mandates that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year.

Organizers from the United Farm Workers sought to take access to property owned by two California growers—Cedar Point Nursery and Fowler Packing Company. The growers filed suit in federal district court seeking to enjoin enforcement of the access regulation on the grounds that it appropriated, without compensation, an easement for union organizers to enter their property and, therefore, constituted an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments. The district court denied the growers' motion for a preliminary injunction and dismissed the complaint, holding that the access regulation did not constitute a *per se* physical taking because it did not allow the public to access the growers' property in a permanent and continuous manner.

A divided panel of the Ninth Circuit affirmed, and rehearing *en banc* was denied over dissent. *Hassid*, 141 S. Ct. at 2069-71. The Ninth Circuit rejected the takings claim because the physical access authorized by the California law was not permanent access, reasoning that such sporadic access did not merit categorical treatment as a *per se* taking. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 532 (9th Cir. 2019) *rev'd sub nom. Hassid*, 141 S. Ct. 2063.

Chief Justice Roberts authored the majority opinion reversing the Ninth Circuit, which Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined. Over the dissent of Justice Breyer, joined by Justices Sotomayor and Kagan, the majority ruled that California's access regulation constitutes a *per se* physical taking that required compensation. *Hassid*, 141 S. Ct. at 2070-80. The Court's ruling, along with how the majority arrived there, follows.

III.

THE OPINION

A. The Task Before the Court.

Supreme Court jurisprudence provides for two main categories of takings that require just compensation: physical takings and regulatory takings. *Id.* at 2071-72. A plaintiff who is challenging a government regulation as a taking can proceed by alleging either a traditional physical taking or a regulatory taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). For a reviewing court, distinguishing physical takings from regulatory takings is critical because the Supreme Court applies different standards to each takings category. *See* Eagle, *supra*, at 628-29 (acknowledging the different takings standards). Prior to *Hassid*, however, the Supreme Court provided ambiguous guidance on how to discern whether a case involved a regulatory or physical taking. *See* Eagle, *supra*, at 628-29. Thus, the task at hand for the Court was to determine under what standard it would review a non-permanent intrusion, authorized by the government, onto private property - - as a regulatory taking or a physical taking.

B. The Court Walks Us Through its Prior Takings Jurisprudence.

Perhaps because the Court was aware that it might be perceived as changing course from its prior takings guidance, the Court spend considerable time retreading the grounds it had already traveled.

1. Private Property Matters!

The Court began its analysis by reminding us that the Fifth Amendment's protection of private property rights were well entrenched in our Constitutional system of government.

> The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."

Hassid, 141 S. Ct. at 2071 (quoting *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017)).

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2022 Land Use eConference

First appeared as part of the conference materials for the
26th Annual Land Use Conference session
"*Cedar Point Nursery v. Hassid*: The United States Supreme Court's Latest Pronouncement on Unconstitutional Takings "