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In a closely-watched property rights decision, the U.S. Supreme Court today held unconstitutional a longstanding California regulation allowing labor unions intermittent access to agricultural workplaces for labor organizing purposes. Reversing a decision of the Ninth Circuit Court of Appeals, a 6-3 Supreme Court majority ruled that the challenged regulation triggers a *per se*, compensable government "taking" of private property under the Fifth Amendment to the U.S. Constitution. The case is *Cedar Point Nursery v. Hassid*.

The implications of today's ruling on environmental, natural resources and public health regulatory programs are unclear at best.

I profiled the *Cedar Point* case in some detail in a previous Legal Planet post at the time the Court heard oral arguments this past spring. Briefly, *Cedar Point Nursery* involves an agricultural industry challenge to a regulation enacted by California's Agricultural Labor Relations Board. The A.L.R.B.'s 1975 "Access Regulation" mandates farmworker union organizers access to the grounds of agricultural growers for portions of up to 120 days/year to speak to farmworkers about whether or not to support the union.

Two California growers challenged the A.L.R.B. regulation as a *per se* violation of the Constitution's Takings Clause because, in their view, the regulation constitutes a physical invasion of their private property rights. Writing for a six-member conservative majority, Chief Justice John Roberts agreed.

Traditionally, the Supreme Court narrowly construed "physical occupation" takings–which are deemed *per se* compensable under the Takings Clause. Conversely, most takings claims were viewed and decided by the Supreme Court and lower federal and state courts under a distinct, more deferential "regulatory takings" analytical framework.

For many years, the distinction between physical occupation takings and regulatory takings seemed straightforward. But more recently, that distinction has become blurred as property owners–recognizing that their chances of prevailing increased if they could characterize their claim as a physical taking–worked hard and creatively to squeeze their lawsuit into the "physical occupation" analytical box. Over the past 20 years, conservative Supreme Court majorities have in a number of decisions increasingly accommodated that strategy. As a result, the distinction between physical occupation and regulatory takings has become increasingly nebulous.

Today's *Cedar Point Nursery* decision continues that trend and, in doing so, hands property rights advocates a significant legal victory. According to Chief Justice Roberts' majority opinion, whenever a regulation results in a physical appropriation of private property–even if intermittent or by a third party–a *per se*, compensable taking has occurred.

The Court's three progressive justices–Breyer, Sotomayor and Kagan–dissented. Citing earlier Supreme Court decisions, they argued that non-permanent invasions of private property should only be deemed violative of the Takings Clause if they "go too far" under longstanding *regulatory* takings principles.

Cedar Point Nursery is unquestionably a victory for private property owners and business organizations, and a major defeat for labor unions. But what is the impact of today's decision on environmental, natural resources and public health regulatory programs?

The answer is unclear. To be sure, Chief Justice Roberts takes pains to distinguish the challenged A.L.R.B. regulation from numerous other government programs. For example, the majority opinion characterizes at least some isolated physical invasions of private property as "properly assessed as individual torts rather than [compensable constitutional takings]." And "government health and safety inspection regimes will generally not constitute takings," in the majority's view.

But the dissent correctly notes that a wealth of currently-commonplace environmental and public health inspection programs may not pass constitutional muster under today's majority opinion in *Cedar Point Nursery*. Warns Justice Breyer in dissent, "the majority has substituted a new, complex legal scheme for a comparatively simpler old one."

What is certain is that landowners and property rights activists will rely on today's decision to frame an increasing number of their takings claims as physical invasions by government, warranting *per se* government liability. And rest assured that they will pursue those claims in a wide array of regulatory contexts besides labor-management disputes–including

government environmental, natural resource and public health programs.

One final note: New York Times Supreme Court reporter Adam Liptak recently wrote an incisive analysis of early voting patterns by the current composition of justices. In that article, Liptak maintains that this Term's decisions have generally not reflected the 6-3 conservative/progressive voting pattern that had been predicted by many Court observers. While that may well be true, today's *Cedar Point Nursery* decision reflects this very 6-3 voting lineup. Whether that's an aberration or a harbinger of ideological things to come beginning with the justices' next Term is a key, unresolved question.