Written by **Michael Tennant** on June 24, 2021

California Can't Force Employers to Allow Union Organizers Onto Their Property: Supreme Court

A California law forcing employers to allow union organizers onto their property is unconstitutional, the Supreme Court ruled Wednesday.

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In a 6-3 decision, the court held that a 1975 law requiring agricultural employers to allow union organizers to invade their property for up to three hours a day, 120 days a year, constituted an uncompensated taking under the Fifth and 14th Amendments and was thus impermissible.

The law was challenged by two Golden State businesses: Cedar Point Nursery, a strawberry grower in northern California, and Fowler Packing Company, a grape and citrus grower and packer in Fresno.

According to a press release from the Pacific Legal Foundation, which represented the businesses,

> In the predawn hours of October 29, 2015, dozens of union activists trespassed on Cedar Point Nursery's property to recruit union members. They waved flags, shouted over bullhorns, intimidated the nursery's staff, and disrupted the workday. When the nursery's owner and president Mike Fahner found out the action was legal in California, he decided to fight what he believed was an unconstitutional law.

Fowler prevented union organizers from entering its property in July 2015, causing the union to file an unfair labor practice complaint against the company, a charge that was later withdrawn.

Cedar Point and Fowler sued in federal district court, seeking an injunction against the access rule on the grounds that it took their property without just compensation as required by the Constitution. The district court denied the motion and dismissed the case, ruling that since union organizers did not have permanent and continuous access to the growers' property, the law did not take the property. A panel of the Ninth Circuit Court of Appeals upheld the district court's decision; judges denied a request to bring the case before the entire court. The Supreme Court chose to hear the growers' appeal.

Chief Justice John Roberts wrote the majority opinion, which was joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Amy Coney Barrett. Justice Brett Kavanaugh filed a separate, concurring opinion.

"The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking," penned Roberts. "Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.

The right to exclude is 'one of the most treasured' rights of property ownership."

As to the lower courts' contention that the rule does not constitute a taking since union organizers aren't allowed to occupy private property every moment of every day, Roberts maintained, "The fact that a right to take access is exercised only from time to time does not make it any less a physical taking."

"This regulation does not 'appropriate' anything; it regulates the employers' right to exclude others," Justice Stephen Breyer argued in his dissent, which was joined by Justices Sonia Sotomayor and Elena Kagan. The three contended that it is perfectly acceptable for the government to abrogate property rights as long as it doesn't go "too far," though one suspects they would be less amenable to this line of reasoning if, say, a state gave pro-life protesters permission to wander the halls of abortion clinics more or less at will.

As is frequently the case, the court's inconsistent precedents, many of which contain imprecise language, enable justices to rule the way they want rather than the way the Constitution demands. Both the majority and the minority cited the same precedents but disagreed on how they should be applied to the case at hand. Breyer acknowledged "that the Court's prior cases in this area are not easy to apply" and that "words such as 'temporary,' 'permanent,' or 'too far' do not define themselves." He also pointed out that some of Roberts' stated exceptions to the takings rule only serve to muddy the waters further.

Still, when the court does the right thing (assuming that includes overturning state law), it should be applauded. Cedar Point's Fahner offered this accolade: "This decision protects everyone's freedom to decide for themselves who is — and is not — allowed on their own property. We're very happy with the Court's ruling today, and we're excited to keep running our businesses without unlawful interference."