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On June 23, 2021, the Supreme Court of the United States (“SCOTUS”) handed down a 6 to 3 decision, Justices Breyer, Sotomayor, and Kagen dissented, announcing that a California regulation that grants labor organizations’ “right to take access” to an agricultural employer’s property in order to solicit support for unionization is a *per se* taking under the Fifth and Fourteenth Amendments. Cal. Code Regs., tit. 8, §20900(e)(1)(C). This decision is a win for agricultural employers against the intrusions and disruptions of labor organizations attempts at unionizing farmworkers.

Under the regulation, labor organizations are supposed to file a notice with the California Agricultural Labor Relations Board (“Board”) prior to entering an employer’s property. The underlying challenge stemmed from two occasions where United Farm Workers either accessed or attempted to access an employer’s property without prior notice. The employer’s challenged the regulation in the Federal District Court for California. The Court denied the preliminary injunction and dismissed the case in favor of the Board saying that the regulation was not a *per se* taking. The employers appealed that decision to the Ninth Circuit Court of Appeals, and a divided panel upheld the lower court’s ruling.

SCOTUS, divided on ideological lines, held that whenever a regulation restricts a property owner’s ability to use his own property, the regulation results in a physical appropriation of the property and is a *per se* taking. The case was reversed and remanded for further proceedings consistent with the SCOTUS decision. What follows depends on a few things, since SCOTUS determined the regulation was a taking, the Ninth Circuit will now have to issue an opinion overturning the District Court and instructing an injunction to be put in place on the Board allowing further intrusions on the land of agricultural employers under the regulation. Depending on the stance the Board takes, they could fight the case on the merits (which will likely result in protracted litigation and a determination of just compensation for the taking) or they could stipulate to judgment and effectively nullify the rule as written and elect to rewrite the regulation.

SCOTUS was very clear that any intrusion on a landowner’s property rights would be considered a taking and would require just compensation for such. The Board could rewrite the regulation requiring such from the labor organizations or they could rewrite the regulation more narrowly to try and conform with the SCOTUS decision (a much harder task given the conclusiveness of the decision). In the short term it is clear that labor organizations will no longer be given access to agricultural employers’ property under this regulation. What remains to be seen is the stance the Board takes and if they want to include a calculation for just compensation in whatever updated regulation they craft.

If they go that route, I imagine that there will again be litigation over the calculation of just compensation, and if they try to craft some limited regulation that meets the SCOTUS decision. I imagine that there will again be litigation over the scope of the regulation and whether it is again a *per se* taking.

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