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"...nor shall private property be taken for public use,
without just compensation."
Fifth Amendment, U.S. Constitution

No Shortage Of Amicus Briefs In SCOTUS Physical Invasion Takings Case

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If you are lacking good things to read, fear not: thanks to amici curiae, you now have boocoo merits-stage friend-of-the-court briefs (15!) on your plate.

This is the case in which the U.S. Supreme Court is considering the nature of physical invasion takings, and how permanent a permanent intrusion must be in order to qualify for *Loretto* and *Kaiser Aetna*-ish *per s*e treatment. In *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (May 8, 2019), a 2-1 panel of the Ninth Circuit affirmed the dismissal of a complaint for failure to plausibly state a takings claim under *Twombly/Iqbal*. At issue was a regulation adopted by California's Agricultural Labor Relations Board which requires agricultural employees to open their land to labor union organizers. The regulation is framed as protecting the rights of ag employees to "access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support."

The Ninth Circuit panel majority viewed the complaint as alleging a *Loretto* physical invasion taking, but held the plaintiffs did not plausibly state a claim because they could not allege the invasion was permanent. The majority instead relied on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), in which the Supreme Court concluded that the California Supreme Court had not effected a judicial taking when it held that the California Constitution required shopping centers to be forums for public speech.

The issue in *Cedar Point*: how "permanent" does a physical invasion have to be to qualify as a *Loretto* taking (or, more accurately here, how well does a complaint need to plead facts to show that the invasion qualified as a *Loretto* taking)? The Ninth Circuit panel majority and the *en banc* concurral pointed out that union organizers aren't allowed on the property all the time. The panel dissent and the *en banc* dissental pointed out that it shouldn't matter that the occupation by union organizers was not literally 24/7, merely that the property right allegedly taken was, you know, taken (government takes easements, permanent and temporary, all the time and pays for that privilege). In our view, this fetish of the amount of time that an occupation is permitted or anticipated should not be the controlling question, and we filed an amicus brief urging the Court to take up the case.

Here is the property owners' merits brief.

We're not going to summarize each of the amici briefs, but instead will highlight four that we think present very interesting arguments.

- United States - "The indefinite legal authorization to invade private property, even intermittently, is a per se taking, absent circumstances not present here."
- Oklahoma and other states - "Finding this case to be a per se physical taking does not require treating all temporary entries as takings."
- Mountain States Legal Foundation - "Further, respect for the Constitution's protection of private property from government interference requires doing away with certain shibboleths that have come to engulf the Nation's takings jurisprudence: namely the 'bundle of sticks' analogy for property and the conflation of public use with public purpose."
- National Association of Counties (in support of neither party) - "Petitioners propose a revolution in takings jurisprudence whereby governments must pay whenever they enter onto private land. They reimagine every such entry as a custom-built "easement" that the public 'appropriates.' They posit that a landowner's right to exclude others not only comprises a distinct property interest in toto, but also that it is divisible into micro-interests abridged by anyone who intrudes for any period of time. In this way, each governmental entry onto private land, no matter how fleeting or unobtrusive, is transmogrified into a direct appropriation of a property interest—a classic taking."

That's not to suggest that the others are not worth your time. They most definitely are:

- Pelican Institute - "Yale professor Robert Ellickson, who studies comparative property rights in land, concluded that human groups living in the Fertile Crescent 10,000 years ago were able to establish permanent settlements, cultivate crops, and domesticate animals because they established property rights that incentivized community members to engage in farming and animal husbandry activities."
- Cato Institute - "*Amici* ask that the Court confirm what it has already implied in several other contexts: that any interference with the 'right to exclude'—be it a small cable running through one's property or an easement permitting others to enter—is a taking of that fundamental attribute, regardless of the rights and interests that remain untrammeled."
- Americans for Prosperity Foundation - "The Court should revisit *Pruneyard* and *Kelo* to clarify the constitutional limits on the government's power to take private property and transfer it to someone else and reverse the Ninth Circuit in this case to protect Petitioners against uncompensated taking of their property rights."
- New England Legal Foundation - "In Neither *Portsmouth Harbo*r Nor *Causby* Did The Taking Depend On The Economic Harm Caused By The Government; In Both, The Servitude Was Treated As Directly Physically Imposed And As Per Se."
- California Farm Bureau Federation - "Indeed, a union can effectively communicate with agricultural employees in California in several ways without having to do so at their workplace."
- Western Growers Association (Michael Berger) - "This Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) has been vastly over-read."

- U.S. Chamber of Commerce - "To be sure, the easement is limited in scope—as easements typically are—but that is relevant to the amount petitioners would be owed as compensation, not the existence of a per se taking."
- Center for Constitutional Jurisprudence - "And whether looking at the original meaning of the Keepings Clause or this Court's doctrine, making it easier for a private organization to recruit members is not a 'public use.'"
- Institute for Justice - "Only the briefest physical invasions can escape the Fifth Amendment's just compensation requirement. This Court should reaffirm that physical invasions, even if they do not qualify for per se treatment, are presumptively takings."
- Buckeye Institute - "Stare decisis does not require *PruneYard*'s retention, and this Court should overrule it."
- Liberty Justice Center - "This Court should reverse the decision below, and in doing so reiterate that employees' First Amendment rights of association are important, but their im-portance does not allow state governments to freely abridge others' Fifth Amendment rights to exclude, which is essential to traditional understandings of pri-vate property, for mere convenience."

Now, on to the government's brief. We'll bring that your way when filed