U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

February 12, 2021

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Cedar Point Nursery, et al. v. Victoria Hassid, et al., No. 20-107

Dear Mr. Harris:

This case involves a California regulation that allows union organizers to enter petitioners' property to speak with workers employed there, but that restricts the time, place, and manner of that access. On January 7, 2021, the United States filed a brief as amicus curiae contending that the regulation effects a per se taking of petitioners' property. The purpose of this letter is to notify the Court that the previously filed brief no longer represents the position of the United States.

Following the change in Administration, the Department of Justice has reconsidered the government's position in this case, and the United States is now of the view that the California regulation does not effect a per se taking under this Court's precedents. The regulation does not authorize a "permanent physical occupation," *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982), or grant the general public any "permanent and continuous right" to cross petitioners' property, *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 832 (1987). Rather, the access authorized is "temporary and limited in nature." *Loretto*, 458 U.S. at 434; see *id.* at 434 n.11 (observing that a provision of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, that "requir[es] companies to permit access to union organizers," subject to various time, place, and manner restrictions, grants only "'temporary and limited'" access and therefore does not effect a per se taking) (citation omitted). This Court has previously recognized that such "temporary limitations on the right to exclude" differ from "[t]he permanence and absolute exclusivity of a physical occupation" and accordingly "are subject to" the "balancing process" adopted in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). *Loretto*, 458 U.S. at 435 n.12.

It is therefore the position of the United States, in line with this Court's cases, that the California regulation—like the authorization of temporary entry by government officials for law enforcement, inspection, and similar purposes—does not constitute a per se taking. That position

accords with the United States' longstanding view—which the government has repeatedly articulated in this Court and lower courts—that physical entry on property short of a permanent occupation does not warrant the application of a categorical rule and is instead appropriately analyzed under a case-specific framework.

I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,

Elizabeth B. Prelogar
Acting Solicitor General

cc: See Attached Service List