CARLTON FIELDS

Eight Is Not Enough: Ninth Circuit Denies En Banc Review in a Takings Clause Case Over Dissenting Votes of Eight Circuit Judges

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On April 29, 2020, the Ninth Circuit Court of Appeals denied a petition for en banc review in a case that raised a takings clause claim that the state of California appropriated private property by requiring certain access to union organizers. Eight judges dissented from that decision. They asserted that the Ninth Circuit has created a circuit split. If so, this case may not be over yet; a certiorari petition may ensue in due course. The short backstory is as follows. The plaintiffs own property in California and employ full-time and seasonal workers in their agricultural field operations. This case was prompted by union organizers entering and attempting to enter the plaintiffs' property under the authority of the California Agricultural Labor Relations Act and the regulations enacted under that act. Specifically, the California Agricultural Labor Relations Board promulgated a regulation familiarly known as the "access regulation" that gave union organizers access to the private property of agricultural employers. Although the access regulation allows union organizers to enter the property only at certain and limited times, it prevents the employer owners from interfering with that access at those times. The plaintiffs sued the board alleging, *inter alia*, a takings clause violation. The district court dismissed the complaint and the Ninth Circuit panel affirmed, 2–1, over a dissent. The court then denied the petition for rehearing en banc. The two original panelists in the majority signed a separate opinion concurring in the decision to deny rehearing en banc. Judge Paez explained the separate concurring decision as follows:

> A majority of the active judges of the court voted against rehearing this case en banc. I concur in that decision and write only to respond to arguments raised in Judge Ikuta's dissent from that decision, which were not raised by the parties. The dissent argues

> that the panel opinion failed to address the Growers' central argument that the Access Regulation appropriates an easement by granting union organizers access to their property without their approval. According to the dissent, because an easement is a species of property, the Access Regulation effects a taking of property in violation of the Fifth Amendment. The dissent accuses the majority of ignoring the Growers' claim and reframing it as a different one. This seriously mischaracterizes the Growers' arguments before this court. They argued one and only one theory of their case: that the Access Regulation amounted to a "permanent physical invasion" of their property. They did not argue that the taking of an easement was the beginning and end of the analysis. They wisely did not do so because the argument advanced by Judge Ikuta fundamentally misapprehends existing Supreme Court authority.

Judge Ikuta's dissenting opinion, joined by seven other circuit judges, disputes that premise that they are addressing an argument not made by the plaintiffs: "The plaintiffs' complaint expressly alleges that they have suffered what the majority refers to as a 'classic taking,' namely that 'the access regulation … creates an easement for union organizers to enter ... private property without consent or compensation,' causing an 'unconstitutional taking.'" Indeed, the dissenting opinion's view is that "the majority errs by attempting to rewrite the plaintiffs' claim that California has directly appropriated their property into a claim that regulatory activity has gone too far by causing a permanent occupation of their land." Putting a fine point on it, the dissenting opinion observes that, "[t]o say, as the majority does, that there has not been a taking, 'is to use words in a manner that deprives them of all their ordinary meaning.'" Although there appears to be sharp disagreement about which point of view is truer to the record and briefing, this order may not be the end of the story. The dissenting opinion joined by seven other circuit judges at a minimum positions the case for possible further review: "This decision not only contradicts Supreme Court precedent but also causes a circuit split. We should have taken this case en banc so that the Supreme Court will not have to correct us again." Stay tuned. This case appears postured for interesting certiorari briefing in the U.S. Supreme Court.

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