

The Brief

FALL 2021

Supreme Court – Review of 2020-2021 Term

While small business owners remained busy over the last year pushing through the pandemic, the NFIB Small Business Legal Center continued to fight for small business in the U.S. Supreme Court by participating in nearly 10 percent of the Court's civil docket. Small business interests prevailed in four of the five cases where the SBLC advocated on behalf of small businesses—an outstanding 80% success rate! Below is a synopsis of each case the SBLC participated in.

CIC Services v. Internal Revenue Service: NFIB's amicus argued that the Anti-Injunction Act does not prevent a taxpayer from challenging an unlawful IRS rule prior to paying an assessment. The Supreme Court agreed, holding that the Act permits pre-enforcement judicial review of tax rules.

Cedar Point Nursery v. Hassid: In this case the Supreme Court echoed the arguments made in NFIB's amicus, holding that the "right to exclude" was a fundamental right of property ownership and California's regulation giving union organizers an unfettered ability to enter an agricultural business's property for

up to three hours a day and 120 days per year, was a *per se* taking without compensation in violation of the Fifth Amendment.

TransUnion LLC v. Ramirez: The case concerned whether a class action lawsuit can be brought when most of the class has not been injured. NFIB claimed each plaintiff needs to show concrete injury. Reversing the Ninth Circuit, the Supreme Court held that every member of the class must have suffered a "concrete harm" to have Article III standing. A technical/procedural statutory violation, by itself, will generally not suffice to establish this harm.

Americans for Prosperity Foundation v. Bonta: This case concerned whether California could require nonprofit organizations that solicit funds in the State to disclose the names and addresses of all donors who give over a certain dollar amount or percentage of contributions each year. NFIB argued this disclosure requirement would have a chilling effect on protected First Amendment speech. The Supreme Court concluded the requirement imposed a burden on donors' associational rights,

violating the First Amendment.

U.S. Fish and Wildlife Service v. Sierra Club: In the lone loss of the term, the Supreme Court sided with agency convenience instead of public transparency. The Court held that inter-agency draft documents were protected from disclosure. NFIB's amicus asserted that these drafts are often the only way to determine the actual reasoning behind a regulation and its appropriateness.

The NFIB Small Business Legal Center looks forward to continuing its aggressive advocacy on behalf of small business interests and last term's success rate when the Supreme Court begins its 2021-2022 term this Fall.

Keep up with our work at:
[NFIB.com/legal](https://www.nfib.com/legal)

Don't forget to check out
our Facebook page for
weekly updates.

facebook.com/NFIB.legal



Protecting One of Your Biggest Assets – Your Property

By Karen R. Harned, Executive Director

As a small business owner, your property is likely one of your biggest assets. Knowing this, the NFIB Small Business Legal Center has been on the front lines protecting your property rights in landmark cases since our founding.

The Fifth Amendment of the U.S. Constitution prevents the taking of private property for public use without just compensation. In the past 20 years, the Supreme Court has issued several important decisions further defining this right in a way that benefits property owners across the country. The NFIB Small Business Legal Center was there -- making the case for small business -- in litigation that created these important precedents regarding the scope of the Fifth Amendment's takings clause:

- Small businesses and all property owners have dominion over their property and the right to exclude union organizers. (*Cedar Point Nursery v. Hassid*)
- The takings clause applies to real property, like raisins, as in the case of *Horne v. U.S.* where the Court found that that raisin growers had a constitutional right to object to the Department of Agriculture's attempt to fine them for not surrendering raisins.
- The government should be limited in what conditions it can impose on a person to get a federal permit to develop their land. (*Koontz v. St. John's River Management District*)
- Property owners may pursue claims against the government for damages when their property is destroyed or damaged by government action even on a temporary basis. (*Arkansas Game & Fish Comm'n. v. U.S.*)
- The takings clause applies to the actions of any form of government, including the courts. (*Stop the Beach Renourishment, Inc. v. Florida Dep't. of Environmental Protection*)

In addition, we have argued against attempts by the federal government to extend its authority beyond what the Constitution requires when it comes to regulation. In *Rapanos v. U.S.*, Justice Scalia supported our position and was clear that the Constitution prevents the federal government from regulating truly intrastate lands. Similarly in *Weyerhaeuser v. U.S. Fish & Wildlife Service*, the Supreme Court found that owners have a right to contest "critical habitat" restrictions under the Endangered Species Act, as we requested.

It is rewarding to see the progress we have made on behalf of small business when it comes to ensuring you can make the most out of your property without fear of government interference, unless the government is willing to fairly compensate you for any such taking. However, there is more work to be done to strengthen your property rights. With your generous support, the NFIB Small Business Legal Center will continue to fight these important battles on your behalf to ensure one of your biggest assets is protected.

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Legal Center Addresses ADA Website Litigation in New White Paper

July 26th marked the thirty-first anniversary of the Americans with Disabilities Act. At the time of its passage, business organizations like NFIB warned that the Act's breadth could be detrimental for and impose substantial costs on small businesses.

To mark the anniversary of the ADA, the NFIB Small Business Legal Center released a white paper entitled, "The ADA and Small Business: Website Compliance Amid a Plethora of Uncertainty." The paper discusses the ADA's uncertain application to business websites and how the lack of guidance impacts small business owners. Before providing a recommendation for small businesses, the paper reviews each branch of government's ineptitude in providing clarity to small business owners.

The Department of Justice has essentially left business owners with a mandate to comply with the ADA, while providing no insight on how to comply or what compliance entails. Further, DOJ's minimal guidance suggests that a good faith but ultimately unsatisfactory attempt at compliance may not protect against enforcement or civil liability.

Because the ADA's applicability to business websites is less-than-clear, courts have been forced to resolve ADA compliance lawsuits and produced a mixed bag of judicial results. While most courts agree that the ADA applies to business websites, they differ substantially on how close the relationship must be between the business website and its physical location for the ADA to apply. Only intensifying the confusion, is the Supreme Court's refusal to weigh in when presented with the issue.

Congress has had multiple chances to amend the ADA to provide clarity and protection to small business owners, including bipartisan-sponsored bills. Yet nothing has passed, and the prospect is increasingly dim.

The Legal Center's white paper recognizes the current reality for a small business—a catch-22 choice between foregoing competition in the online market, staying in the market without modifying its website, and spending significant money to meet a standard that may not be necessary. Ultimately, any small business utilizing a website to make sales, promote products, offer location information, offer discounts, or even advertise, should seriously consider updating its website to meet the standard most likely to be required—the WCAG 2.0 AA guidelines.

NFIB Small Business Legal Center Continues its COVID-19 Small Business Resource Campaign

The NFIB Small Business Legal Center continues to provide small business owners with the information they need to navigate the ongoing COVID-19 crisis. In July, Legal Center Senior Executive Counsel Beth Milito, along with her colleague Holly Wade, Executive Director of the NFIB Research Center, launched a weekly series, Small Biz Coffee Corner Chat on Facebook Live. The program aired every Thursday at 2 PM EST and offered Q&A on pandemic recovery financial assistance programs like PPP, EIDL, ERC, and more.

The Legal Center is also continuing to host NFIB's COVID-19 webinar series, which can be seen every other Wednesday at 12 PM EST. The webinar on August 11, 2021, featured Veronica Pugin, a Senior Advisor to SBA's Office of Capital Access. Ms. Pugin reviewed the Economic Injury Disaster Loan (EIDL) program, a non-forgivable 30-year loan between \$1,000 up to \$500,000 with a 3.75% interest rate that is available to businesses with 500 employees or less through December 31, 2021.

The Legal Center has also hosted several webinars focused on the Employee Retention Credit, a program that applies to tax years 2020 and 2021 and offers small business owners up to \$33,000 in refundable tax credits per employee. We continue to update resources on the ERC at NFIB.com/ERTC. All NFIB webinars are recorded and can be viewed at NFIB.com/webinars.

Finally, the Legal Center continues to respond to business owner inquiries by phone and email. While we cannot offer legal advice, meaning we cannot explain or interpret the law or say how it would apply to a case, we can provide helpful resources and information to steer you in the right direction. NFIB members with questions can email info@nfib.org for assistance with either a COVID or non-COVID legal inquiry.

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Amicus Round-up

The Small Business Legal Center's latest amicus work has primarily focused on two widespread litigation issues related to COVID-relief legislation: the American Rescue Plan's Tax Mandate and challenges to the termination of supplemental unemployment benefits.

American Rescue Plan Tax Mandate

The American Rescue Plan Act, which became law on March 11, 2021, includes a provision that says ARP funds cannot be used: "[T]o either directly or indirectly offset a reduction in the net tax revenue of such state"

NFIB has joined several States in lawsuits to argue that this prohibition is an intrusion on the core sovereignty of States to determine their own tax policy, is an impermissibly coercive condition on federal funds, and harms small business by preventing States from reducing their tax burden. So far, NFIB has filed amicus briefs in Alabama, Arizona, Kentucky, Missouri, and Ohio courts, and the U.S. Courts of Appeal for the Eighth and Ninth Circuits, supporting the over twenty states pushing back against this provision. We will be filing a brief in the Texas case in early-September.

Termination of Unemployment Benefits

Under the CARES Act, effective March 27, 2020, States entered agreements with the federal government to provide federally funded supplemental unemployment benefits, which significantly increase the amount of money unemployed Americans are paid not to work. Earlier this year, governors began withdrawing their States from receiving the supplemental benefits. Individuals who would have received these extra benefits if their governor had not ended them, sued, primarily alleging violations of State law.

The Legal Center has joined with States to defend the governors' withdrawals and argued in NFIB's briefs that these governors had the authority to withdraw from the agreements, and providing these benefits is causing a labor shortage and hurting small business recovery. We have filed amicus briefs in Ohio, Oklahoma, South Carolina, Florida, and Tennessee, and received favorable preliminary rulings in the Ohio and South Carolina trial courts.

The NFIB Small Business Legal Center, a 501(c)(3), public interest law firm, protects the rights of America's small business owners by serving as the voice of small business in the courts and the legal resource for small business owners nationwide. It is not a legal defense fund for small business, but a legal tool to affect precedent-setting legal decisions that will influence small business' bottom line.

Media Mentions

NFIB Small Business Legal Center

May 5, 2021

"Getting all the documentation required . . . was extremely challenging, and even CPAs had trouble understanding the rules," Elizabeth Milito, senior executive counsel for the National Federation of Independent Business (NFIB) Legal Foundation, told The Center Square.

🔗 <https://www.washingtonexaminer.com/politics/some-wyoming-businesses-required-to-return-covid-19-relief-money>

May 18, 2021

Report on Beth Milito's Senate testimony opposing a new paid leave, quoting Beth, *"I understand the good intentions behind various proposals to mandate leave, but NFIB and its members have long opposed leave requirements for two reasons—inflexibility and cost."*

🔗 <https://news.bloombergtax.com/payroll/stage-set-for-senate-paid-leave-debate-over-taxes-and-benefits>

July 9, 2021

An article on the Legal Center's successful Supreme Court term appeared in the Oregon Business Report and other business journals across the country. Quoting Karen Harned, *"Small businesses are constantly dealing with ever-changing business laws and regulations, and these decisions will make it a little easier for owners to run their business."*

🔗 <https://oregonbusinessreport.com/2021/07/4-big-supreme-court-wins-for-business/>

July 13, 2021

Report on the Legal Center challenging a provision in the American Rescue Plan that prevents states from cutting taxes, pointing to our argument that the provision *"threatens the states' sovereignty to enact their own tax policies."*

🔗 <https://www.law360.com/compliance/articles/1402487/chamber-backs-ky-tenn-s-bid-to-block-virus-tax-cut-limit>

August 2, 2021

Report on the Legal Center's defense of Oklahoma Governor's discontinuation of bonus unemployment insurance payments. *"We believe it was well within Gov. Stitt's authority to end the state's participation in a federally funded program that frustrates Oklahoma's economic recovery,"* Harned said.

🔗 <https://journalrecord.com/2021/08/02/nfib-supports-move-to-end-federal-supplemental-assistance/>

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