

A state law to promote tourism creates an easement across a portion of a private farm for hikers who wish to use a historic trail that crosses the farm. The law allows the farm's owner to charge hikers a fee to cover the costs of this use, but it does not otherwise compensate the owner.

Is the law constitutional?

- A. No, because the fee provision violates the privileges and immunities clause.
- B. No, because the law takes the owner's property without just compensation.
- C. Yes, because the fee provides the owner with just compensation.
- D. Yes, because the law has the public purpose of promoting tourism.

Correct

Collecting Statistics

52 secsTime Spent

2023Version

### **Explanation:**

A **physical taking** occurs when the government **permanently and physically occupies** private property. The Fifth Amendment **takings clause**, which applies to the states through the Fourteenth Amendment due process clause, bars the government from taking private property unless:

the taking is for a **public use**—ie, any use that is rationally related to a legitimate public purpose (eg, promoting tourism) *and*

the owner receives **just compensation**—ie, the **property's fair market value**.

Here, a physical taking occurred when the state law created an easement that permanently and physically occupied a portion of the owner's farm. The taking is for a public use because it is rationally related to the state's legitimate public purpose in promoting tourism **(Choice D)**. The law does allow the owner to charge hikers a fee to cover the costs of the easement's use. But those fees do *not* provide the owner with just compensation because they do not equal the easement's fair market value **(Choice C)**. Therefore, the law is an unconstitutional taking.

**(Choice A)** There are two **privileges and immunities clauses**. The Article IV clause (ie, comity clause) prohibits states from discriminating against citizens of other states by denying them a right of state citizenship (not seen here). And the Fourteenth Amendment clause bars states from interfering with the narrowly defined privileges or immunities of national citizenship (also not seen here).

### **Educational objective:**

A physical taking occurs when the government permanently and physically occupies private property. Such a taking violates the Fifth Amendment takings clause unless the taking was for public use and the owner received just compensation (ie, the property's fair market value).

### **References**

Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 434 (1982) (holding that a permanent, physical invasion of private property by the government always constitutes a taking).

26 Am. Jur. 2d Eminent Domain § 112 (2021) (explaining just compensation).

Copyright © 2021 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

## Fifth Amendment taking

