No. 17-1198

In the
Supreme Court of the United States

MARTINS BEACH 1, LLC AND
MARTINS BEACH 2, LLC,

Petitioners,

v.

SURFRIDER FOUNDATION,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is an injunction to preserve the status quo until a party applies for a permit a *per se* taking?

2. Should this Court review the California Court of Appeal's fact-specific application of the California Coastal Act for an assortment of alleged constitutional concerns?

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INTRODUCTION

Petitioners argue that an injunction to preserve the historical use of the property until petitioners apply for a permit qualifies as a *per se* taking.

But there is no division of authority on that issue. Petitioners cite no case holding that an injunction to preserve the status quo until the resolution of the normal permit process qualifies as a *per se* taking. The few cases petitioners cite that suggest *per se* treatment might be extended to non-permanent occupations are largely based on discredited dicta, and those cases predate this Court's most recent opinion addressing temporary government occupations.

The California Court of Appeal did not hold injunctions could not be takings. It did not hold temporary occupations could not be takings. It did not even hold this particular injunction was not a taking. It only held that this injunction was not a *per se* taking. And there is no split on that issue.

To make their situation appear compelling, petitioners mischaracterize the opinions below. Despite their assertions, the injunction does not require petitioners to "run a business." It simply requires that the "'gate across Martins Beach Road must be unlocked and open to the same extent that it was unlocked and open at the time [petitioners] purchased the property.'" Pet. App. 60 n.32 (quoting Pet. App. 70). The injunction would be no bar if petitioners want to go out of business and stop charging a fee, and California law would immunize them from liability to members of the public if they did so.

By the same token, the injunction does not compel speech—indeed, the injunction does not even mention

the billboard that is the subject of petitioners' complaints. Pet. App. 70. As the Court of Appeal explained, "the injunction requires nothing with respect to the billboard, and [petitioners] have not been assessed penalties for violating the Coastal Act in that (or any other) respect." Pet. App. 60-61 n.33.

More broadly, petitioners' takings claims are simply off base. Neither the Coastal Commission nor San Mateo County has compelled any action, levied any penalty or fine, or forced or prevented any conduct by petitioners with respect to their property. Indeed, the Coastal Act itself explicitly prohibits the County and Commission from taking action inconsistent with petitioners' constitutional rights. Cal. Pub. Res. Code § 30010.

In addition to the misstatements in the petition and the lack of any disagreement in authority on the questions presented, there are at least four reasons this case is an inappropriate vehicle for this Court's review.

First, under the well-established law of this Court, a takings claim is not ripe when the property owner has not applied for a permit to gain the relief they seek.

Second, this case is a poor vehicle for review of a takings claim because—unlike every Supreme Court takings case cited in the petition—the government is not a party to this action.

Third, petitioners assume the property is indeed "private" and the public has no preexisting easement to access the beach. But the question of whether the public has the right to access petitioners' property is currently being litigated in another case pending in

the California Court of Appeal. If California courts do ultimately conclude that previous owners of the property dedicated the road and beach to public use, it would moot both questions presented.

And fourth, the California Legislature passed a statute directing the state to investigate the acquisition of a public right of way at Martins Beach through negotiation or condemnation. Cal. Pub. Res. Code § 6213.5. The Legislature is now taking steps to set aside funding for that purpose, and the state could condemn the property and pay petitioners just compensation at any time. If the state does exercise its condemnation power, it would likewise moot this case.

Certiorari should be denied.

STATEMENT OF THE CASE

This case involves two companies that bought prime beachfront property with full knowledge that the public had accessed the beach across that land for nearly a century. Pet. App. 3; 11 CT 3122; 7 RT 565.[1] Prior to the companies' purchase of the property, they were told by a San Mateo County official that "[t]here is existing parking [and] access to the beach at Martins Beach" and that "the access is there and will have to remain." 13 CT 3857-58.

The prior owners of the property had invited the public onto the property and kept the access road open during the day for decades. Pet. App. 83, 85; 11 CT 3120-21; *see also* 5 RT 161, 183, 221; 8 RT 636, 661-

[1] Cites to "CT" are to the Clerk's Transcript in the California Court of Appeal proceeding in this case, No. A144268; cites to "RT" are to the Reporter's Transcript in that court.

662. With limited exceptions for individuals engaging in disruptive or illegal behavior, members of the public were not asked to leave the property, nor were they informed they were trespassing if they were using Martins Beach. Pet. App. 85; 11 CT 3122; 5 RT 160, 190, 231-232; 7 RT 451; 8 RT 646-648.

Petitioners purchased the property in the summer of 2008. Pet. App. 2. During the winter of 2008-09, petitioners closed the access road to the public for an extended period. As a result, San Mateo County notified petitioners that closure of the public's beach access required a Coastal Development Permit.

The County reminded the companies that "any change in the public's ability to access the shoreline at Martins Beach triggers the need for a [permit] because it represents a 'change in the intensity of use of water or access thereto.'" 13 CT 3865 (quoting Cal. Pub. Res. Code § 30106). The County requested information "to evaluate whether future beach closures would trigger the need for a [coastal development permit]." 13 CT 3864-65. Attempting to work cooperatively with petitioners, County staff "suggested that a schedule of operation be provided, along with an explanation of how the schedule relates to historic patterns of public use." 13 CT 3864-65.

In response to the County's notification, petitioners promised to "maintain the same amount and type of access as did [their] predecessors." 13 CT 3867. But petitioners never provided the information the County sought to evaluate the access. 7 RT 571.

In April 2009, the County wrote to petitioners explaining they had not received the requested information, and again offered options to resolve the issue:

petitioners could offer the same access as reflected in the San Mateo County Local Coastal Plan in effect when the Coastal Act was enacted, or could provide evidence documenting the changes in public access since that time and how their future plan of access compared to these historical practices. 13 CT 3871.

In response, petitioners told the County they would "provide access to the extent" the prior owners did, and offered to give the County affidavits to support their contentions about how frequently that access was provided in the past. 13 CT 3877. But petitioners never provided the promised information.

Instead, petitioners sued San Mateo County and the California Coastal Commission in June 2009, seeking a declaration and injunction that the companies were not required to maintain public access. Pet. App. 86; 11 CT 3122-23; 13 CT 3601-15. The court dismissed the suit because petitioners had failed to comply with the Coastal Act and had not submitted their proposal to end access to the appropriate administrative body. 11 CT 3123.

Petitioners completely cut off public access to the coast in the fall of 2009. Pet. App. 4; *see also* 11 CT 3122; 7 RT 547-548, 602-604. Despite their representations to the County, petitioners closed the gate, put up a "no-access" sign, painted over the billboard that used to announce beach access, and hired security guards to patrol the property. Pet. App. 4, 84; *see also* 7 RT 549-551; 11 CT 3121; 14 CT 4099-4110.

Neither the Coastal Commission nor the County fined petitioners or took any action beyond sending letters. Pet. App. 6, 63-64. Petitioners kept the beach

closed and made no attempt to apply for a development permit. So Surfrider, a nonprofit organization dedicated to the protection and enjoyment of the world's oceans, filed a state-court complaint in 2013 under the citizens suit provision of the California Coastal Act.[2]

Surfrider's three-count complaint sought 1) a declaratory judgement that petitioners' conduct qualified as "'development' in a 'coastal zone' without a permit"; 2) an injunction preventing petitioners "from blocking access to the coastal zone at Martin's Beach without a Coastal Development Permit"; and 3) fines for knowingly engaging in development without a permit. 1 CT 10-11. Petitioners raised the takings issue as an affirmative defense. 1 CT 20.

After hearing testimony from nineteen witnesses over five court days, the superior court denied Surfrider's request for fines, but granted declaratory relief and an injunction. Pet. App. 69-70. The injunction provides in full:

> [Petitioners] are hereby ordered to cease preventing the public from accessing and using the water, beach and coast at Martins Beach until resolution of [petitioners]' Coastal Development Permit application has been reached by San Mateo County and/or the Coastal Commission. The gate across Martins Beach Road must be unlocked and open to the same extent that it

[2] A nonprofit like Surfrider has standing to bring this citizen suit in California's courts, but the courts below had no reason to analyze whether standing would be appropriate under federal law.

> was unlocked and open at the time [petitioners] purchased the property.

Pet. App. 70.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR REVIEW.

Putting aside for the moment the lack of any disagreement in authority, the Court should not grant review because of several threshold issues: the questions presented are not ripe, the case does not involve the proper parties, and the issues may be mooted at any moment.

A. Any takings claim is not ripe because petitioners have not even applied for a permit.

The California Court of Appeal properly concluded that petitioners' challenge to the permit requirement as an unconstitutional taking would not be ripe for review until petitioners applied for—and the Coastal Commission processed—a permit. Pet. App. 22-26. Petitioners have yet to apply for a development permit. *Id.*

1. As this Court has repeatedly explained, a "requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985). For

this reason, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985).

This is a clear and basic rule. The lower courts follow it, and the petition cites no uncertainty on this issue.[3] Petitioners do not argue that seeking a permit would be futile, unduly time consuming, or that they should be excused from the permit requirement for other procedural reasons. They simply ignore the issue, arguing that an injunction preserving the historical use of the property until they apply for a permit is a *per se* taking.[4]

2. Although the Court of Appeal concluded that

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[3] The Court is reconsidering a different aspect of *Williamson County* in a case next Term, *Knick v. Township of Scott, Pennsylvania*, No. 17-647, but the rule requiring a final determination on a permit application is not at issue in that case. *Knick* deals with whether a takings claim requires exhaustion of remedies in state courts; the petition does not challenge the rule requiring a final determination on permit applications by the government. *See, e.g.*, Knick Pet. 14 (noting the conclusion by the Court in *Williamson County* that the local government had not reached a final decision on the permit application "should have ended the case," but arguing the *Williamson County* Court improperly went on to announce a rule requiring exhaustion in state courts).

[4] On the merits, this argument would mean that a massive swath of federal and state regulations qualify as unconstitutional takings.

petitioners' challenge to the injunction issued to enforce the permit requirement (as distinct from their challenge to the permit requirement itself) was ripe (Pet. App. 26-28), California law is somewhat broader than federal law in allowing consideration of injunctions in this context.[5] Petitioners cite no federal cases holding that courts may review an injunction to preserve the status quo until the property owner applies for a permit, and numerous cases are to the contrary.

In *Riverside Bayview*, for instance, the district court issued an injunction prohibiting petitioner from filling its land without a permit. 474 U.S. at 125. The unanimous Court agreed that this was not a ripe takings claim. *Id.* at 127. Similarly, in *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002), a logging company claimed that an injunction prohibiting them from the most lucrative uses of their land qualified as a taking. The Federal Circuit easily rejected this claim, explaining "the initial denial of a permit is still a necessary trigger for a ripe takings claim. If the government denies a permit, then the aggrieved party can seek compensation." *Id.* at 1347-48 ("[N]o taking occurred because the government never denied the permit.") (footnote omitted).

No aspect of petitioners' takings claim is ripe. The trial court's injunction simply preserves the status quo until petitioners apply for a permit and the government issues its decision on that application. After that, either the permit will be approved and there will be no government restriction, or the Coastal Commission's determination on the permit will apply. That determination, along with the factual record created

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[5] *See* Petr. Ct. App. Br. 63 n.35 (citing California cases).

before the Coastal Commission, will provide the basis for analyzing any future takings claim at Martins Beach. In either case, the trial court's injunction will expire by its own terms. Pet. App. 70 (injunction lasts "until resolution of [petitioners]' Coastal Development Permit application").

B. The state is not a party to this suit.

Most of the Court's takings cases involve at least one governmental party. And for good reason. Only the government is capable of "taking" private property for public use within the meaning of the takings clause. Likely for that reason, every Supreme Court takings case the petition cites involves a government entity.

But the state is not a party to this dispute. There is no one to pay just compensation even if the facts are determined to be a taking—and it would hardly be fair to resolve the takings issue against the state when it is not a party.

Indeed, petitioners did not even comply with the rules of this Court requiring notice to the state. Under Supreme Court Rule 29(4)(c), because this case involves the constitutionality of a state statute, "the initial document filed in this Court shall recite that 28 U.S.C. §2403(b) may apply and shall be served on the Attorney General of that State." There is no such recitation in the petition, nor does the certificate of service reflect that a copy was sent to the California Attorney General.

C. Another pending case may determine petitioners have no right to exclude the public.

Both questions presented in the petition for certiorari depend on the premise that petitioners have the right to exclude the public. *See* Pet. 1-35. But that issue is being litigated in a different case currently on appeal. *Friends of Martin's Beach v. Martins Beach 1 LLC, et al*. (Cal. Ct. App. 1st Dist. No. A154022, *docket available at* goo.gl/Bs6HXJ).

In the *Friends of Martin's Beach* case, a different organization is arguing that the prior owners of Martins Beach dedicated a right of access to the public during the decades they owned the property. Pet. App. 3 n.3 ("whether there has been a dedication of a public use right is at issue in separate ongoing litigation to which Surfrider is not a party"); *id.* 6-7. The California Court of Appeal previously reversed the trial court's summary adjudication against plaintiff Friends of Martin's Beach, holding the plaintiff had "alleged facts sufficient to state a common law dedication claim." *Friends of Martin's Beach v. Martin's Beach 1 LLC*, 201 Cal. Rptr. 3d 516, 548 (2016) (depub.). In its opinion, the California Court of Appeal explained that the prior owners of Martins Beach might have dedicated an easement to the public "through their words and acts" under any one of three separate theories: express dedication, implied-in-fact dedication, or implied-in-law dedication. *Id.* at 519.

If petitioners' predecessors-in-interest dedicated a public easement, that will eliminate petitioners' takings claims—petitioners would have purchased the Martins Beach property subject to this easement, so

have no right to exclude the public. Petitioners might have a fraud claim against the prior owner had the easement been concealed (although here petitioners were fully aware of the public access at the time of purchase, Pet. App. 3), but petitioners would have no takings claim.

Following remand from the California Court of Appeal in the *Friends of Martin's Beach* case, the trial court found in favor of petitioners on all three theories. Pet. 9-10. But Friends of Martin's Beach filed a notice of appeal on April 2, 2018, and that appeal is pending before the same California Court of Appeal that reversed the summary judgment in the prior appeal. (*See* Cal. Ct. App. No. A154022, *docket available at* goo.gl/Bs6HXJ).

The Court of Appeal may again reverse. And a judgment does not have res judicata effect under California law until all direct appellate remedies are exhausted. *Morris v. McCauley's Quality Transmission Serv.*, 60 Cal. App. 3d 964, 973 (1976). So even though the trial court entered (for the second time) what it termed a "final judgment" (Pet. 10), that judgment will not actually be final until all direct state appellate remedies have been exhausted.

If this Court were to grant review, there is a significant risk the issues presented would be mooted by a finding that there has been a common law "dedication" of a right of access to the public.

D. The state Legislature started a process to negotiate for or condemn access across petitioners' land.

This case is unusual in that the California Legislature enacted a law granting the California State

Lands Commission authority to negotiate with petitioners to purchase a right of public access across this property. *See* Cal. Pub. Res. Code § 6213.5(a). This is not just some vague power; there is now a section of the California Code entitled "Negotiations for right-of-way or easement at Martins Beach." *Id.* The California Legislature ordered the State Lands Commission to begin the process of negotiating for public access, providing "[t]he commission shall consult, and enter into any necessary negotiations, with the owners of the property known as Martins Beach . . . to acquire a right-of-way or easement." *Id.*

Although negotiations have not proven successful so far, the Legislature further provided that the Commission can acquire a right of access through condemnation proceedings. Cal. Pub. Res. Code §§ 6213.5(b), 6210.9. Indeed, the Legislature is now taking steps to provide dedicated funding for this purpose by allocating $1,000,000 to pay for any condemnation. *See* Cal. SB 839, Budget Act of 2018 (authored by Sen. Holly Mitchell, introduced to Senate Jan. 10, 2018) at 243 ("Upon order of the Department of Finance, the Controller shall transfer up to $1,000,000 from the Land Bank Fund to the Martins Beach Subaccount.").

If this Court were to grant certiorari, the controversy could be rendered moot if California condemns a right of public access while the case is pending before this Court.

It is an unusual takings case where the state is not a party. It is a more unusual case where the question of whether this is even a taking is an open issue in another pending case. It is an even more unusual case where a state statute specifically addresses the

potential purchase or condemnation of the property in question. And combined with all those factors, petitioners' failure to apply for a permit renders this case entirely unfit for this Court's review.

II. THERE IS NO DIVISION OF AUTHORITY ON WHETHER AN INJUNCTION PENDING A PERMIT APPLICATION IS A *PER SE* TAKING.

Review is not warranted even apart from the vehicle issues. There is no division of authority on whether an injunction that lasts only until a decision on a permit application qualifies as a *per se* taking.

1. Although there are a "'nearly infinite variety of ways in which government actions or regulations can affect property interests,'" this Court "has identified only certain narrowly-defined categories of 'government interference with property' that are considered per se (or 'categorical') takings." Pet. App. 37 (quoting *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012)).

As the unanimous opinion of this Court in *Arkansas Game & Fish* explained, "we have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking. So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land. But aside from the cases attended by rules of this order, most takings claims turn on situation-specific factual inquiries." *Arkansas Game & Fish*, 568 U.S. at 31-32 (citations omitted).

2. Petitioners argue that any physical invasion or occupation is a *per se* taking, even if it is indefinite rather than permanent. But they cite no case holding an injunction pending a permit application qualifies as a *per se* taking.

This Court recognized the *per se* rule for "permanent physical occupations" in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). *Loretto* dealt with a state law requiring landlords to permit cable companies to physically install and maintain cable boxes on the roofs of apartment buildings. *Id.* at 423-25. The government had no timeline for removal of the cable boxes, and the property owner could not do anything to hasten their removal. In this context, the Court held a *per se* taking occurs when there is a "permanent physical occupation" of the owner's land. *Id.* at 421.

The "permanent" qualifier was no casual modifier or errant dicta. The Court repeated "permanent" or "permanently" no less than *29 times* in the *Loretto* majority opinion. The Court noted that it had "consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . . A taking has always been found only in the former situation." *Id.* at 428. And subsequent cases have emphasized the importance of the permanence requirement laid out in *Loretto*. *See, e.g.*, *Lingle v. Chevron*, 544 U.S. 528, 538 (2005); *Boise Cascade*, 296 F.3d at 1355-57.

3. Petitioners' primary claim of a circuit split relies on *Hendler v. United States*, 952 F.2d 1364 (Fed.

Cir. 1991) and its progeny. Pet. 17 (*Hendler* is "leading case"). In *Hendler*, the Federal Circuit considered whether the government's installation of 100-foot deep wells on plaintiff's property qualified as a taking. 952 F.2d at 1369, 1376. These wells were designed for monitoring hazardous waste, and the government capped them with steel-reinforced cement and installed cement and steel fences around them. *Id.* at 1376. The government had given no "indication of a timetable for withdrawal" of the wells, and there was nothing plaintiff could do to hasten their removal. *Id*.

In this context, the Federal Circuit's musings in *Hendler* that "'permanent' does not mean forever" (*id.*) provides no support for petitioners. The government in *Hendler* was in control of the length of the occupation and showed no inclination to remove the substantial cement wells. In this case, by contrast, petitioners can control the length of the injunction by filing their permit application. Pet. App. 70.[6] As the Court of Appeal noted, petitioners' refusal to apply for a permit does not transform the temporary duration of the injunction into a permanent physical invasion. Pet. App. 51 n.28.

Moreover, the Federal Circuit has subsequently described *Hendler*'s discussion of the definition of "permanent" as "dicta" and disclaimed any intent to disregard this Court's decision that only a permanent invasion or occupation qualifies for *per se* treatment.

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[6] There are strict procedures and timelines for the state to follow when acting on a permit application. *See, e.g.*, 14 Cal. Code of Reg. §§ 13050-13170. And, as noted, petitioners do not argue they should be excused from the permit process because it would be futile or take an undue amount of time.

See, e.g., *Boise Cascade*, 296 F.32d at 1353, 1356-57. In *Boise Cascade*, the court rejected an argument that the government's repeated entries onto plaintiff's property over a course of several months qualified as a permanent occupation, explaining that *Hendler* "has been widely misunderstood and criticized as abrogating the permanency requirement established by the Supreme Court in *Loretto*. Obviously, this court is without power to abrogate the law established by the Supreme Court, and *Hendler* does not purport to do so. Language such as this must be read in context. And in context, it is clear that the court merely meant to focus attention on the character of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration." *Id.* at 1356 (footnote and emphasis omitted); *see* Pet. App. 47.

In addition, *Hendler* was issued more than two decades before this Court's unanimous decision in *Arkansas Game & Fish,* which addressed whether government actions causing serious flooding on private property over the course of six years was a taking. *Arkansas Game & Fish*, 568 U.S. at 31, 38. Despite arguments from amici that a temporary invasion "is no different in kind than a permanent invasion" and thus the government's six-year-long physical invasion should qualify as a *per se* taking, *see* Pacific Legal Found. et al., Amici Br. in *Arkansas Game & Fish*, at 3-4, 8-13, this Court explained "most takings claims turn on situation-specific factual inquiries" and instructed that a multifactor test be applied to this taking claim based on a temporary occupation. *Arkansas Game & Fish*, 568 U.S. at 31-32.

Petitioners do not cite or address *Arkansas Game & Fish* a single time, even though the court below cited it no less than 15 times in its opinion. Indeed, *none* of the federal appellate cases that petitioners cite as evidence of a split post-date the December 12, 2012 decision in *Arkansas Game & Fish*. The only case from the last six years that petitioners cite as evidence of the alleged split is a Guam territorial court decision. Pet. 19.

Nor do any of the cases petitioners cite involve situations where the length of the alleged taking was within the owner's control. *See Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1361-63 (Fed. Cir. 2012) (government entered plaintiffs' land to create new roads, construct a permanent tented structure, install underground motion-detecting sensors, and station Border Patrol agents over a period of nine years); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1348, 1348 (Fed. Cir. 2006) (government erected a six-foot tall fence topped with barbed wire that prevented plaintiff from accessing some of its land for eight years); *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 6 (1st Cir. 2007) (government official seized funds owned by plaintiff). Here, of course, the duration of the injunction is largely within petitioners' control.

This isn't a difficult case requiring careful parsing of the meaning of "permanent." An injunction to preserve the status quo pending the normal resolution of a regulatory review process is not a *per se* taking.

4. Petitioners cite language from *Tahoe-Sierra* that they imply requires application of a *per se* rule

for *any* government occupation of property, even a temporary occupation. Pet. 16-17 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)); Pet. 22. As the court below explained, "[t]he language in *Tahoe* is dicta, because the issue in the case was whether a regulation that temporarily deprived a property of all economic use was a per se taking. But, in any event, even if *Tahoe* can be read to identify a new category of per se takings for temporary government occupations of property, there was no such exclusive occupation in the present case." Pet. App. 55-56 n.29 (citation omitted).

5. Because petitioners limited their claim to a *per se* taking, Pet. App. 60, this case does not present any issue of whether some non-permanent injunctions can qualify as takings. "'[T]emporary limitations are subject to a more complex balancing process to determine whether they are a taking.'" *Arkansas Game & Fish,* 568 U.S. at 36 (quoting *Loretto*, 458 U.S. at 435, n.12); *see* Pet. App. 55 ("[Petitioners] cite no case supporting the proposition that the courts have created a category of per se takings covering temporary physical invasions, such that the invasions are always takings, 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.'").

The Court of Appeal did not address whether the facts of this case qualified as a taking under a multifactor test. The court simply held that, on the record before it, the injunction was not in fact a *per se* taking. This issue involves nothing more than application of established law to a unique set of facts—not least of

which is that petitioners essentially control the duration of the injunction.

III. THIS COURT SHOULD NOT REVIEW THE FACT-SPECIFIC APPLICATION OF A CALIFORNIA STATUTE.

Petitioners also seek this Court's review of the application of the California Coastal Act to the specific facts of this case. They assert that, "[b]y the lower court's telling, private property owners can be compelled to invite the public onto their private property, to provide parking and soft drinks at Whip-Inflation-Now prices, and to advertise this extraordinary opportunity to the very public the property owner would like to exclude." Pet. 33.

Petitioners made these same assertions below. The Court of Appeal explained that petitioners were mischaracterizing the injunction. But rather than disputing or even acknowledging the California court's interpretation of the California injunction, petitioners simply repeat the same claims before this Court. These assertions are incorrect and unfair to the lower courts.

1. Petitioners contend that the California courts required them to operate a purportedly unprofitable business and dictated even the "absurdly low" fees they must charge. Pet. 1-2, 15. But that is simply false. As the Court of Appeal explained, the "injunction does not obligate [petitioners] to provide staff or any amenities," Pet. App. 60 n.32, and does not even mention a fee, Pet. App. 70. All the injunction requires is that the "'gate across Martins Beach Road must be unlocked and open to the same extent that it

was unlocked and open at the time [petitioners] purchased the property.'" Pet. App. 60 n.32 (quoting Pet. App. 70).[7]

Nor is there a de facto need for petitioners to spend time or money to ensure the safety of the public on their land. Under California law, landowners receive immunity for injuries to members of the public who enter their property for a "recreational purpose" as long as they don't charge a fee. Cal. Civ. Code § 846. If petitioners were to cease charging the public to access the beach (or "close their business," as they claim to want to do), section 846 would protect them from liability unless they engaged in willful or malicious conduct.

Petitioners don't need to maintain restrooms, keep the parking lot paved, or hand out soda. All the injunction requires is that they refrain from shutting a gate that has historically been left open without applying for a permit. As the court below summed up, if petitioners "decided to stop spending funds on maintaining beach access, section 846 of the Civil Code would protect them from liability for any hazardous conditions that developed. . . . Thus, [petitioners'] claim that the injunction forced them to operate a business is without merit." Pet. App. 60 n.32.

2. By the same token, petitioners argue that the California courts "even manage[d] to compel speech" by requiring them to leave up a billboard that has stood on the property for more than 60 years. Pet. 32;

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[7] This language was actually added to the injunction at petitioners' suggestion, after they complained that an earlier proposal for the injunction left it unclear when they could exclude the public from their land. 11 CT 3153.

see Pet. App. 83. But the injunction does not mention the billboard. Pet. App. 70. As the Court of Appeal explained, "the injunction requires nothing with respect to the billboard, and [petitioners] have not been assessed penalties for violating the Coastal Act in that (or any other) respect. If the Coastal Commission denies [petitioners] a [coastal development permit] and requires them to advertise beach access, a free speech claim might be ripe for review. But the cases [petitioners] cite do not establish a basis for relief at this time." Pet. App. 60-61 n.33.

In ruling on the declaratory relief claim, the trial court did mention the billboard, noting that "changing the messages on the billboard on the property" qualifies as development under the Coastal Act, and petitioners were thus required to apply for a permit. Pet. App. 70. But the court made no ruling as to whether the Coastal Act would require the billboard to stay up, and a declaratory judgment that petitioners need to apply for a permit hardly constitutes a taking. Had petitioners bought a hotel after being warned by the county that it had been designated as a historic structure that couldn't be altered, it would not be "compelled speech" for a court to declare petitioners must seek a permit before taking down the name of the hotel from the facade.

3. Turning to their as-applied takings challenge, petitioners claim *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987), is "another case involving the California Coastal Commission's efforts to coerce a private property owner to open its property to the public without compensation." Pet. 27. But the Coastal Commission is not a party to this case. It has

made no final determination with respect to petitioners' actions. And the reason it has not done anything with respect to Martins Beach is because petitioners have never asked it to. Petitioners' takings challenge in the absence of government action is untenable.

Petitioners repeat this misstatement throughout their petition. Their argument depends on their claim that the "Coastal Act seizes an easement over Martins Beach in exactly the manner that *Nollan*, *Dolan*, and *Koontz* considered a *per se* taking." Pet. 28. But each of those cases involved a property owner who applied for a permit and received a final determination from the state or local government. *See Nollan*, 483 U.S. at 828 (commission "granted the permit subject to their recordation of a deed restriction granting the easement"); *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994) (city "granted petitioner's permit application subject to conditions"); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 603 (2013) ("the District denied his application because he refused to make concessions"). Here, the Coastal Commission has never reached a final decision applying the Coastal Act to Martins Beach because petitioners have never applied for a development permit. As the trial court found, petitioners "admitted that 'unless and until' a permit application is made, nobody can know how the County or Commission will rule on that application." Pet. App. 91.

Consider a simple hypothetical. Assume the prior owners had invited a member of the public to live on the property for the last 50 years. That person might well have a claim to stay on the property under adverse possession, tenant's rights, zoning, or some other type of regulation—and the takings clause

would surely not bar a state court from issuing an injunction to prevent petitioners from evicting that person until the claims had been sorted out. The public is in the same position after nearly a century of invited access, and the takings clause is no bar to a state court injunction preserving the public's historical access until the legality of petitioners' efforts to evict the public is straightened out.

4. Finally, petitioners suggest that the Coastal Act's definition of development is so broad that it effectively constitutes a taking. But the claim that regulations are too broad would be evaluated under the flexible *Penn Central* standard absent a claim that the regulation deprived the owner of all economically beneficial uses of his or her land. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Petitioners explicitly disclaimed any argument under *Penn Central* below, Pet. App. 39, 57, and have never argued that the Coastal Act deprives them of all economic value in the land, so their attempt to entice this Court into the weeds of the California Coastal Act is not only unwise but improper.

While petitioners attempt to cast doubt on the application of the Coastal Act to cover this development, the California courts' interpretation is consistent with over 20 years of Coastal Act law. *See, e.g., Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 55 Cal. 4th 783, 793-796 (2012). Petitioners admitted below that they took actions that fall within the literal terms of the statute. Pet. App. 82. In any event, the correctness and wisdom of the California courts' interpretation of a California statute is not before this Court.

* * *

This case involves a fact-specific application of a California statute to a property where public access has existed for a century. The public access rights over that property remain in dispute in pending state court litigation, and the state has yet to take final action. The Court of Appeal took its responsibility seriously and issued a lengthy opinion carefully considering all the arguments petitioners made. The California Supreme Court saw no need to review the holding. There is no split of authority on this issue, and no need for this Court's review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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