IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

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

Applicants,

v.

SURFRIDER FOUNDATION,

Respondent.

APPLICATION TO THE HON. ANTHONY M. KENNEDY FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE FIRST APPELLATE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

Pursuant to Supreme Court Rule 13(5), Martins Beach 1, LLC and Martins Beach 2, LLC (collectively, "Martins" or "Applicants") hereby move for an extension of time of 30 days, to and including Thursday, February 22, 2018, for the filing of a petition for a writ of certiorari to review the decision of the First Appellate District Court of Appeal of the State of California dated August 9, 2017 (Exhibit 1). A petition for review to the Supreme Court of California was denied on October 25, 2017. The jurisdiction of this Court is based on 28 U.S.C. §1257.

1. Unless an extension is granted, the deadline for filing the petition for certiorari will be Tuesday, January 23, 2018.

2. This case presents an exceptionally important question at the intersection of two of this Court's seminal takings cases—namely, whether a government-imposed public-access easement that is finite in duration constitutes a *per se* physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458

U.S. 419 (1982), or whether it should instead be analyzed under a multi-factor balancing test like that established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). That question has divided the lower courts and has immense importance to property owners throughout the country, as the decision below creates untenable uncertainty about the circumstances under which the government may physically invade private property without paying just compensation.

3. Martins are the owners of private property located south of Half Moon Bay, California ("Martins Beach"). Martins Beach borders the Pacific Ocean and is sheltered from the north and south by high cliffs that stretch out into the Pacific Ocean; the only access to Martins Beach by land is down a private road also owned by Martins. Martins' predecessors-in-interest, the Deeney family, ran a private-beach business, allowing patrons to use their private road to access their private beach upon payment of a fee. After Martins purchased the property and operated the private-beach business at a loss for two years, they decided to shut down the business and close public access to the beach. The decision below, however, held that the California Coastal Act requires Martins to obtain a coastal development permit before they may exclude the public from their private beach. As a result, Martins is foreclosed from exercising their right to exclude the public from their concededly private property unless and until they receive a permit. In other words, the Coastal Act has imposed a public-access easement over Martins Beach.

4. The court below acknowledged that the Coastal Act imposed a public-access easement over Martins' property. And the court below acknowledged that a "permanent" public-access easement is ordinarily a *per se* physical taking. Ex.1 at 31; *see, e.g.*, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, … we have no doubt there would have been a taking."). Yet the decision below remarkably concludes that the Coastal Act does not effect a *per se* physical taking, and instead must be assessed under a multi-factor balancing test, solely because the State might eventually decide to grant Martins a coastal development permit—*i.e.*, because, in the court's view, the taking might prove to be "temporary": "[F]or a physical invasion to be considered a *per se* taking, it must be permanent." Ex.1 at 37.

5. The decision below deepens a split among state and federal courts over whether a public-access easement that is potentially finite in duration is a *per se* physical taking. *Compare, e.g.*, *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ("In this context, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term—what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute."), *and Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1065 n.5 (N.Y. 1989) ("[W]here, as here, the governmental action resulted in a per se taking, the offending action constitutes a taking for whatever time period it is in effect."), *with Surfrider Found. v. Martins Beach 1, LLC*, 221 Cal.

Rptr. 3d 382, 411 (Cal. Ct. App. 2017) ("[F]or a physical invasion to be considered a *per se* taking, it must be permanent."), *and Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 548 (Iowa 2017) ("[T]emporary takings are not per se violations but are instead analyzed under the multifactor *Penn Central* test. We therefore reject the Brakkes' per se takings claim.").

6. Applicants' Counsel of Record, Paul D. Clement, requires additional time to research the factual record and complex legal issues presented in this case and to prepare a petition that fully addresses the important and far-reaching issues raised by the decision below in a manner that will be most helpful to the Court. Furthermore, between now and the current due date of the petition, Mr. Clement has substantial briefing and oral argument obligations, including an opening brief in *Archdiocese of Washington v. WMATA, et al.*, No. 17-7171 (D.C. Cir.) and oral argument in *Encino Motorcars, LLC v. Navarro*, No. 16-1362 (U.S.).

For the foregoing reasons, Applicants request that an extension of time to and including Thursday, February 22, 2018, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,

January 11, 2018

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