No. _____

In The

Supreme Court of the United States

LETICA LAND COMPANY, LLC,

Petitioner,

v.

ANACONDA-DEER LODGE COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Believing there was a public right-of-way across Letica's private property, a local government physically invaded that property, removed a berm with heavy equipment, and eliminated Letica's right to exclude the public for well over three years. Eventually, the Montana Supreme Court concluded there was no public right-of-way, but rejected Letica's takings claim, reasoning that this Court's decision in *Langford v. United States*, 101 U.S. 341 (1879), forecloses a takings claim when the government's actions are under a mistaken "claim of right."

The question presented is:

Whether the Montana Supreme Court is correct that the government can avoid Fifth Amendment liability when it continually physically invaded and damaged private property for a period of years merely because it wrongly believed that it had a right to use the property.

LIST OF ALL PARTIES

Petitioner Letica Land Company, LLC was the appellant in the Montana state court proceedings below.

Respondent Anaconda-Deer Lodge County is a consolidated city-county government in Montana and was the appellee below.

CORPORATE DISCLOSURE STATEMENT

The Petitioner is a Michigan limited liability company which has no parent companies, subsidiaries, or affiliates that are publicly owned, and no publicly held entity owns any part of it.

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PETITION FOR A WRIT OF CERTIORARI

Letica Land Company, LLC respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The Montana Supreme Court's opinion on the constitutional question (App. A) is reported at 435 P.3d 634. The Montana Supreme Court's order denying rehearing (App. D) is not reported. An earlier decision of the Montana Supreme Court discussing the factual background of this case (App. C) is reported at 362 P.3d 614.

JURISDICTION

The Montana Supreme Court entered judgment on February 5, 2019. Letica timely petitioned for rehearing, and that petition was denied on March 12, 2019. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides "nor shall private property be taken

for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

Believing there was a public right-of-way across Letica's property, Anaconda-Deer Lodge County physically invaded Letica's private property, removed a berm that otherwise blocked access, and encouraged the public to use the road. App. 3.

After public use continued for over three years, the Montana Supreme Court ultimately held that there was no public right-of-way across Letica's property, and remanded for reconsideration of Letica's takings claim. App. 3–4.

But the district court rejected that takings claim, and so did the Montana Supreme Court, holding that *Langford v. United States*, 101 U.S. 341 (1879) forecloses an inverse condemnation claim when the government "mistakenly asserts the right to use its own property." App. 6. That is, the Montana Supreme Court rejected Letica's takings claim because it read *Langford* to hold that a physical invasion that was done "under claim of right" does not create takings liability, and instead sounds only in tort. App. 7–8.

The problem is that *Langford* originated in the Court of Claims at a time when that court lacked jurisdiction over constitutional claims—something it acquired just a few years later with the passage of the

Tucker Act. So rather than apply settled inverse condemnation law, the Montana Supreme Court relied on a case that is irrelevant, let alone controlling. And it has now established a constitutional rule that is in direct conflict with many of this Court's decisions.

STATEMENT OF THE CASE

In 2012, the Anaconda-Deer Lodge County Commission "reaffirmed" that two long-disused sections of road on Letica's property were statutorily created county roads. Those two roads were referred to as the lower branch and the upper branch of Modesty Creek Road. App. 3.

From the beginning, there was a general agreement that at least parts of the lower branch had likely been statutorily created as a county road, but the parties disagreed on where the road ended. Either way, it was undisputed that the lower branch would not, on its own, provide access to any public land because everyone agreed that it dead-ended on Letica's property. App. 39, 44.

In contrast, the upper branch—which forked off the lower branch—ultimately led to the Beaverhead-Deerlodge National Forest. Letica consistently argued —even before the Commissioners reaffirmed the roads —that the upper branch had never been a county road, and that the documents the County relied on for that belief referenced a road that was miles away. App. 37, 43, 79.

In any event, the same week it "reaffirmed" the two branches of Modesty Creek Road, the County cut open two locked gates on the lower branch and sent in heavy equipment to remove a berm on the upper branch. App. 3.

Letica filed a complaint immediately. It sought declaratory judgment about the status of both roads. It also later brought a series of constitutional claims—including a takings claim under 42 U.S.C. § 1983. App. 86–87.

The district court eventually bifurcated the claims, deciding that it would address the status of the roads before reaching any constitutional issue. App. 3.

Before trial, the County discovered a Road Record book in the Clerk and Recorders office. That Record clarified that Letica had been right about the upper branch all along, and that it had never been a statutorily created county road. Yet the district court refused to enjoin public access over the upper branch and allowed the County to go to trial with the theory that the upper branch was subject to a public prescriptive easement. App. 43.

After a bench trial, the district court ultimately concluded that the lower branch was, in fact, a county road that dead-ended on Letica's property. It also found that despite decades of non-use, there was a public prescriptive easement over the upper branch. App. 44.

On appeal, the Montana Supreme Court reversed as to the upper branch, concluding that even if there

were once a public prescriptive easement over the upper branch, it had long since been extinguished by reverse adverse possession. App. 65–66. That decision came down in 2015, and by the time it did, the public had been using the upper branch to cross nearly a mile of Letica's property for over three years.

The Montana Supreme Court then remanded for consideration of Letica's constitutional claims. App. 67. The district court granted the County's motion for summary judgment, holding that no constitutional taking occurred. App. 33. Letica appealed again.

The Montana Supreme Court affirmed, holding—in a published opinion—that because the County believed it had the right to use the upper branch, Letica's remedy "is in tort and the mistake does not amount to a constitutional taking." App. 24, 6. It plucked this rule from *Langford*, reasoning that because the county "acted under a claim of right," its actions were reasonable and *Langford* therefore "preclude[s] Letica's claim that a taking occurred." App. 8.

The Montana Supreme Court then denied Letica's petition for rehearing, and this petition followed. App. 71–72.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court misinterpreted the straightforward rules that apply to inverse condemnation claims and has therefore applied the Fifth

Amendment in a way that conflicts with many consistent decisions of this Court. This case is therefore not just about the misapplication of a properly stated rule of law. Rather, it is about the Montana Supreme Court grossly misstating a consistent body of federal takings law and creating a novel and unsupported defense to Fifth Amendment takings liability throughout Montana.

If the judgment of the Montana Supreme Court is allowed to stand, governmental entities throughout the State can invade public property at will so long as they claim they believe they have a right to do so. That result is inconsistent with the plain language of the Fifth Amendment, it is inconsistent with this Court's longstanding case law involving inverse condemnation claims, and it threatens the constitutional rights of everyone who owns property in Montana.

I. The Montana Supreme Court's reliance on dicta from *Langford* was error, as was its conclusion that Letica should have sued in tort.

The Montana Supreme Court believes *Langford* stands for the rule "that if the government mistakenly asserts the right to use its own property, and the property in fact belongs to another, the true property owner's remedy is in tort and the mistake does not amount to a constitutional taking." This is wrong for two distinct reasons.

First, *Langford* originated from the Court of Claims at a time when that court lacked jurisdiction to decide

constitutional questions. There, the Court recognized that the takings issue was beyond the jurisdiction of the trial court, noting that "[i]t is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation." *Langford*, 101 U.S. at 343–44. Of course, *Langford* predated the Tucker Act, which in 1887 expanded the jurisdiction of the Court of Claims to include "claims founded on the Constitution of the United States." Act of March 3, 1887, ch. 359, 24 Stat. 505, now codified at 28 U.S.C. § 1491.

Second, even if the Montana Supreme Court was correct that Letica's claims sounded in tort, this Court has consistently held that inverse condemnation claims are, at bottom, tort claims. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717 (1999). This is because when the government denies just compensation for what amounts to a taking, the government's actions "are not only unconstitutional but unlawful and tortious as well." *Id.*

Thus, even if the Montana Supreme Court believed Letica's claims sounded in tort, it misstated this Court's inverse condemnation jurisprudence and created a new statewide standard inconsistent with the self-executing mandate of the Fifth Amendment. Indeed, to the extent the "claim of right" as a defense to a taking would otherwise have any continuing import from *Langford*, the Federal Circuit has already rejected the idea. *Presault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (recognizing that the imposition of an easement on claimant's property under

government's mistaken belief it had a valid easement is still a taking).

II. The Montana Supreme Court ignored this Court's categorical rules about takings.

Three relevant holdings from this Court show why the County's action constitute a taking, and the Montana Supreme Court ignored all three.

First, the right to exclude is "perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–180 (1979). This right is so "universally held" to be a fundamental property right that it "falls within th[e] category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179–180.

Second, when the government imposes a public right-of-way on private property—however minimal the economic cost it entails—the owner loses the right to exclude and so a taking occurs. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831–32 (1987).

Third, once government action qualifies as a taking, no later action can relieve it of its duty to provide compensation during the time the taking was effective. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012).

Here, all of these conditions are satisfied. When the government asserted the existence of a public right-of-way across Letica's property, removed a berm

with heavy equipment, and then encouraged public use for a period of years, Letica lost the right to exclude the public—and the government—from its own property. And the government did seek to impose an easement on Letica's property—first claiming there was a statutorily created public road and then shifting to a claim that there was a public prescriptive easement. Either way, this Court has been clear that even if the government physically invades only an easement in property, it must pay compensation. *Kaiser Aetna*, 444 U.S. at 179–80.

The Montana Supreme Court's decision cannot be reconciled with any of these decisions, and its decision has insulated the government from takings liability Statewide, in direct conflict with the consistent holdings of this Court.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

June 10, 2019.

Respectfully submitted,

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