No. _____

In The
Supreme Court of the United States

WESTERN RADIO SERVICES COMPANY, INC.,

Petitioner,

v.

JOHN ALLEN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Ninth Circuit

# PETITION FOR A WRIT OF CERTIORARI

Marianne Dugan, Attorney at Law
Counsel of Record
259 East 5th Avenue, Ste 200D
Eugene, Oregon 97401
(541) 338-7072
fax 866-650-5213
mdugan@mdugan.com

## QUESTIONS PRESENTED

Where a company alleges that, after it began filing legal challenges against Forest Service decisions, the agency singled it out for delay and inaction on its permitting requests, and refused to enforce site plan provisions against the company's competitor, does the Administrative Procedures Act preclude a Bivens claim for First Amendment Retaliation and "Class of One" Equal Protection?

## LIST OF PARTIES

The name of the Petitioner is:

Western Radio Services Company, Inc.

The names of the Respondents are:

John Allen, Deschutes National Forest Supervisor; Kate Klein, Ochoco National Forest Supervisor; Kevin Larkin, Bend-fort Rock District Ranger; Slater R. Turner, Lookout Mountain/ Crooked River National Grassland District Ranger; Rick Kessler, Special Use Permits, Bend/fort Rock Ranger District; Lisa Dilley, Special Use Permits, Bend/fort Rock Ranger District; Heidi Scott, Special Use Permits, Ochoco National Forest; Karen Brand, Special Use Permits, Ochoco National Forest; United States Forest Service; Kent Connaughton, Regional Forester; Maureen Hyzer, Acting Regional Forester.

## CORPORATE DISCLOSURE STATEMENT

Western Radio Services Company, Inc. is a corporation that has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Western Radio Services Company, Inc., petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Ninth Circuit (entered March 23, 2018, with rehearing denied May 21, 2018), affirming the District Court's Orders and Judgment in favor of plaintiff, United States.

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## OPINIONS BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit (Fisher, N.R. Smith and Hurwitz, Circuit Judges) is not reported, and is set forth in the Appendix at App. 1a through App. 5a. The Order of the United States District Court for the District of Oregon (Aiken, J.) granting defendants' Motion to Dismiss the Bivens claim is not reported, and is set forth in the Appendix at App. 6a through App. 28a. The Order of the United States District Court for the District of Oregon (Aiken, J.) granting defendants' Motion for Summary Judgment is published at Western Radio Services Company, Inc. v. Allen, 147 F. Supp. 3d 1132 (D. Or. 2015), and is set forth in the Appendix at App. 29a through App. 56a. The District Court's Judgment is not reported and is set forth in the Appendix at App. 57a through 60a. The Order of the United States Court of Appeals for the Ninth Circuit (Fisher, N.R. Smith and Hurwitz, Circuit Judges) denying plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc is not published, and

is set forth in the Appendix at App. 61a through 62a.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 23, 2018. App. 1a-5a. The Ninth Circuit denied petitioner's petition for panel rehearing and rehearing en banc on May 21, 2018. App. 61a-62a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This is an action brought under Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971). Bivens was the first Supreme Court decision authorizing plaintiffs to bring claims for money damages against individual federal officials based on constitutional violations where no federal statute authorized such a suit; courts have subsequently referred to these as "Bivens claims."

The petitioner alleges that respondents violated its rights under the First Amendment of the United States Constitution, which reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people . . . to petition the government for a redress of grievances."

The petitioner also alleges that respondents violated its right to equal protection ("class of one") under the Fifth Amendment of the United States Constitution (as interpreted in Bolling v. Sharpe, 347 U.S. 497 (1954)), which reads in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE

Pursuant to special use permits issued by the Forest Service, Western Radio Services Company, Inc. (Western) operated telecommunications facilities on several Forest Service sites starting the 1970s, ending only very recently when the government unilaterally shut Western out of those sites as alleged in the complaint in this case.

Western's customers include public safety agencies, local government, doctors, hospitals, public transportation, contract fire fighters for the Forest Service and BLM, off grid residences, service and construction industries. Most of Western's subscribers seek communications service from Western because those services and signal coverage are not available from the large cellular companies. Western's network operates at lower frequencies that propagate better and/or at higher power levels than the cellular companies offer. While both Western and the cellular companies have to make a business case for network expansion, Western's more basic service offerings allow it to provide service in more sparsely populated, low demand areas. Therefore, for many areas and wireless users in

Central and Eastern Oregon, Western was the only wireless service provider available.

Western's tower facilities at Gray Butte, Round Butte, and Sugar Pine also supported the wireless networks of three cellular companies, two wireless internet companies, a large fire district, a sheriff's department, a low power FM station, and Oregon Department of Forestry.

Western generally experienced good relationships with the agency, until Western began filing administrative appeals and lawsuits against the Forest Service and its employees for agency actions and inactions that were risking degradation of the quality and reliability of the communications services Western was providing to the public.

After Western began bringing its grievances against the Forest Service, the agency began refusing to take action on Western's applications; denying Western's applications; failing to renew leases and permits; and giving preferential treatment to Western's competitors on the Forest Service's communications sites, including AT&T (evolved from one of the "Baby Bell" companies resulting from the breakup of the "Ma Bell" monopoly; see Pacific Bell v. Calif. PUC, 621 F.3d 836 (9th Cir. 2010)).

Western filed this lawsuit under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), for violation of the First Amendment (retaliation) and for violation of the Equal

Protection ("class of one"); and also sued under the Administrative Procedures Act (APA). The agency filed counterclaims for trespass and unjust enrichment.

The court dismissed plaintiff's Bivens claim, holding that it was precluded by the Administrative Procedures Act (APA), despite the fact that plaintiff made clear the Bivens claim was in the alternative, if the court held there was no APA claim available to plaintiff.

The court then, in a separate ruling, granted summary judgment to defendants on the APA claim.

The court also ruled in the Forest Service's favor on its counterclaims, holding that Western had trespassed and was unjustly enriched.

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## REASONS FOR GRANTING THE WRIT

Supreme Court review is appropriate because the Panel's decision conflicts with this Court's decision Wilkie v. Robbins, 551 U.S. 537 (2007), which left open the opportunity for a Bivens claim against a federal agency when the agency's behavior cannot be remedied under the Administrative Procedure Act. Consideration by the Supreme Court is therefore necessary to secure and maintain uniformity of the court's decisions.

Furthermore, the proceeding involves a question of exceptional importance. The Circuit decision creates confusion and lack of clarity as to when a Bivens remedy is available to citizens and businesses affected

by government inaction.

## ARGUMENT

The Ninth Circuit Panel erred by upholding the dismissal of plaintiff's Bivens claims.

## I. STATEMENT OF FACTS

The backdrop of the disputed conduct of Forest Service employees at Western Radio's Walker Mountain communications site includes some of the same defendants in this litigation. After the fourth time Western appealed Forest Service decisions to approve or process applications for new tower facilities at locations that would interfere with Western's existing network, the Forest Service sued Western for trespass and breach over construction of a much-needed replacement tower at Western's tower facility. D. Or. 3:11-cv-00638-SI (Lead Case); D. Or. 6:11-cv-06209-SI (Consolidated Case); D. Or. 3:13-cv-01186-SI (additional litigation filed by United States). In those cases, Judge Simon found there was a requirement for Western to sign an amended lease to replace an existing tower. Western noted that the District Ranger had refused to prepare an amended lease for signature. Judge Simon also found that Western was required to submit detailed tower construction plans. Western noted that the District Ranger had never requested such plans. Some of the Walker Mountain litigation remains pending in the Ninth Circuit. Ninth Cir. No. 14-35382. The result was that Western had to reduce the capacity at its tower facility at Walker while AT&T (evolved from one

of the "Baby Bell" companies resulting from the breakup of the "Ma Bell" monopoly; see Pacific Bell v. Calif. PUC, 621 F.3d 836 (9th Cir. 2010)) is allowed to build a later-approved tower that the District Ranger and AT&T knew would interfere with Western's existing facility.

The Forest Service's suits against Western sought to remove the old tower – which Western admitted was required to be removed, because it was outdated and needed to be replaced. To facilitate the removal of the old tower, both Western and US Cellular relocated antennas from the old tower to the replacement tower. In addition, Western's president was singled out for a criminal citation for maintaining a structure on Forest Service land – but neither US Cellular nor its contractor were cited.

During the litigation on Walker Mountain, Forest Service counsel asserted that his client would soon be scrutinizing Western's other Forest Service tower facilities and that Western should expect more adverse actions by agency employees. The agency actions addressed in this current litigation occurred shortly thereafter.

The Forest Service failed to take into consideration the effect nonrenewal and revocation will have on Western's wireless subscribers and its tower facility tenants and customers. Western's customers include public safety agencies, local government, doctors, hospitals, public transportation, contract fire fighters for the Forest Service and BLM, off grid residences,

service and construction industries. Most of Western's subscribers seek communications service from Western because those services and signal coverage are not available from the large cellular companies. Western's network operates at lower frequencies that propagate better and/ or at higher power levels than the cellular companies offer. While both Western and the cellular companies have to make a business case for network expansion, Western's more basic service offerings allow it to provide service in more sparsely populated, low demand areas. For many areas and wireless users in Central and Eastern Oregon, Western is the only wireless service provider available.

These existing tower facilities at Gray Butte, Round and Sugar Pine also support the wireless networks of three cellular companies, two wireless internet companies, a large fire district, a sheriff's department, a low power FM station, and Oregon Dept. of Forestry.

## II. THE PANEL ERRED IN HOLDING THAT PLAINTIFF'S BIVENS CLAIMS ARE PRECLUDED BY THE ADMINISTRATIVE PROCEDURE ACT

The Panel erred in holding that plaintiff had alleged final agency action on all of its claims, reviewable under the APA (and therefore not supporting a Bivens claim).

It is true that, following this Court's decision in Wilkie v. Robbins, 551 U.S. 537 (2007), the Ninth Circuit held that a plaintiff is precluded from bringing a Bivens action when an alternative, existing remedy is

available under the APA. Western Radio Services Co. v. U.S. Forest Service, 578 F.3d 1116, 1125 (9th Cir. 2009). However, in recent years, several courts have distinguished Wilkie and Western Radio in situations where there is no APA claim or remedy available.

In its complaint, plaintiff explicitly invoked that recent case law, and explicitly sought a Bivens remedy only in the alternative – in the event the court found there was no APA remedy, stating that the Bivens claims were sought "in the alternative" (regarding any claims for which the court determines there is no APA remedy):

> 12. Pursuant to the analysis set forth in Edgar v. U.S., D. Or. No. 09-6376-AA, Nov. 9, 2011 (distinguishing W. Radio Co. v. U.S. Forest Serv., 578 F.3d 1116 (9th Cir. 2009)); Martin v. Naval Criminal Investigative Service, 9th Cir. No. 11-56717 (Sept. 5, 2013) (unpublished) (distinguishing W. Radio Co. v. U.S. Forest Serv., 578 F.3d 1116 (9th Cir. 2009)); Munsell v. Dep't of Agric., 509 F.3d 572 (D.C. Cir. 2007); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), plaintiff pursues the Bivens claims only in the alternative to the APA claims. For any claims which the court determines an APA remedy is not available, plaintiff alleges that the current status of case precedent allows plaintiff to proceed on a Bivens theory for money damages and injunctive relief for ongoing civil rights violations.

CR 26, ER 53, First Amended Complaint ¶ 12 (emph. added).

Yet the district court dismissed the Bivens claims on the pleadings, before even issuing a ruling on the APA claims. Thus, at the time the Bivens claims were dismissed, there had been no finding that the APA applied to the claims.

Both the district court and the Panel incorrectly held that the APA applies to all of plaintiff's claims.

The reasoning applied in Martin v. Naval Criminal Investigative Service, 9th Cir. No. 11-56717 (Sept. 5, 2013), is clearly applicable here. Although that case is unpublished and therefore not precedential, it is one of the few appellate cases to shed light on the interplay between the APA and Bivens. As here, in Martin the alleged retaliatory actions were "perpetually open, rendering the APA's provision for 'final' review of agency actions perpetually illusory" – and thus, an APA remedy unavailable.

Similarly, the allegations regarding many of the Forest Service communications sites involve a perpetual failure to act, placing plaintiff in administrative limbo, as in Martin. For example, as the district court noted regarding the Sugar Pine site, plaintiff's applications were "on hold" indefinitely. The same "on hold" status was alleged regarding other sites.[1]

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[1] Because the Bivens claim was decided on a motion to dismiss, the court is required to "assume the truth of respondents' factual allegations." Hui v. Castaneda, 130 S. Ct. 1845, 1849 n. 1 (2010).

During oral argument, the government argued that plaintiff could have alleged a failure to act under the APA, 5 U.S.C. 706(1). However, that type of claim is allowed only when there is a statute or regulation mandating a certain action by the government. ONRC Action v. Bureau of Land Mgmt, 150 F.3d 1132, 1137 (9th Cir. 1998). Judicial review of agency inaction is appropriate only if a plaintiff makes a showing of "agency recalcitrance . . . in the face of clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility." ONRC Action, 150 F.3d at 1137 (quoting Public Citizen Health Research Group v. Comm'r, Food & Drug Admin., 740 F.2d 21, 32 (D.C. Cir. 1984)).

The plaintiffs in ONRC Action alleged that the BLM's refusal to impose a moratorium on certain actions pending completion of an Environmental Impact Statement "would violate the mandates of [the National Environmental Policy Act ("NEPA")], requiring preservation of alternatives during the EIS process." 150 F.3d at 1134-35. They also alleged a violation of the Federal Land Management Policy Act ("FLPMA"), requiring revision of land use plans when "appropriate." Id. at 1135, 1139. On the FLPMA claim, the Ninth Circuit explained that FLPMA and its implementing regulations set forth policy statements and general guidance, and allow for revision of land use plans without a schedule mandating when plans must be revised, but that neither the FLPMA nor its regulations set forth a clear statutory mandate. Id. at 1139-40. The Ninth Circuit characterized the plaintiffs' challenge as "one seeking to compel compliance with NEPA and

FLPMA" and determined that the action was not subject to review under 5 U.S.C. 706(1) because the BLM did not have a clear duty to impose the requested moratorium under either NEPA or the FLPMA. Id. at 1137-38, 1140. Similarly, no judicial review of the agency's inactions can be available in the instant case under the APA.

Plaintiff also alleged improper actions by the Forest Service which the Forest Service unilaterally declared were unappealable – refusal to renew leases; the trespass notice; and failure to review plaintiff's development proposal for Sugar Pine.[2]

Even if the actions were subject to the APA (despite unavailability of administrative review, lack of a true administrative record, and therefore lack of meaningful judicial review), taken together with the government's inactions, the government's behavior in regards to plaintiff's administrative matters paint a picture of retaliation for plaintiff's First Amendment activity – under the proper standard for review of a dismissal on the pleadings without discovery. After decades of successful communications operations on Forest Service communications sites (serving law enforcement and public safety, among other sectors), plaintiff's formerly congenial relations with the Forest Service turned sour after Western began challenging the agency's decisions regarding various matters. Western's history of

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[2] The district court ignored plaintiff's challenge to the agency's interpretation that there was no review allowed.

seamless, basically automatic lease renewals, was suddenly, without explanation, interrupted, with the only causal factor (viewing the pleadings in the light most favorable to plaintiff) retaliation for Western's First Amendment activities.

All of the alleged Forest Service actions and inactions are the result of retaliation against Western and its President for petitioning the Forest Service in response to other actions and inactions that were degrading the quality and reliability of the communications services Western provides to the public. The Panel's decision provides de facto immunity to agencies to retaliate against permit holders who assert their First Amendment right to petition the government by challenging the agency's decisions in court and in the administrative realm.

In Wilkie, this Court focused on whether there was a sufficient remedy available to the plaintiff under the APA. In the instant case there was no process provided, no meaningful administrative record was developed, and no review was provided. Any judicial review was therefore meaningless, as there was nothing for the Court to review.

But in large part, the allegations of the complaint involve a complete failure to act by the government, with no mandate provided by statute or rule and therefore no judicial review allowed, as made clear by the Ninth Circuit in ONRC Action. Thus, normally there would be no lawsuit allowed at all, because the APA would not provide for judicial review. However, in

Wilkie, this Court made clear that, in the absence of an adequate APA remedy, the citizen is allowed to bring a Bivens claim. The Panel's decision thwarts that ruling from this Court.

Here, plaintiff properly alleged two Bivens claims – 1) First Amendment (retaliation for filing administrative appeals and lawsuits) and 2) Equal Protection "class of one" (differential treatment of Western Radio with no rational basis).

In Village of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073 (2000), this Court made clear nearly twenty years ago that it is unconstitutional to single out a business for adverse government action, and that refusal to process government approvals without rational basis violates the Equal Protection Clause.

Similarly, in Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283 (9th Cir. 1999), the Ninth Circuit made clear just as long ago that government retaliation for First Amendment activity violates the Constitution.

No adequate APA remedy was available; and therefore plaintiff's well-pleaded Constitutional claims should have been allowed to proceed. It was improper for the district court to dismiss the Bivens claim on the pleadings; and equally improper for the Ninth Circuit Panel to uphold that dismissal.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARIANNE DUGAN, Attorney at Law
Counsel of Record
259 East 5th Avenue, Suite 200-D
Eugene, OR 97401
(541) 338-7072
fax 866-650-5213
mdugan@mdugan.com