No.

IN THE
Supreme Court of the United States

HUGH MARTIN, SANDRA KNOX–MARTIN, KIRKLAND JONES, THERON MALOY, SHERILYN MALOY,
PETITIONERS

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Whether parties who own property inside national forest boundaries or other federally-owned lands, and who assert R.S. 2477 rights to easements accessing their inheld estates, must exhaust federally-mandated special use permitting requirements to rebuild roads damaged by forest fires before bringing a taking's claim when those permitting requirements implicitly deny claims of private ownership in the easements and place undue burdens on private property ownership?

Whether the United States has physically occupied property when it denies the existence of private easements across federal lands pursuant to R.S. 2477 and seeks to prevent the putative owners of those easements from repairing roads or generally exercising any ownership rights over those easements without the permission of the federal government?

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OPINIONS BELOW

The Unpublished Opinion of the United States Court of Appeals for the Federal Circuit in *Martin et. al. v. United States*, Docket No. 17-2224, decided July 11, 2018, affirming the Federal Claims Court's order granting Defendant's Motion to Dismiss Plaintiffs' Complaint for Lack of Jurisdiction, is set forth in the Appendix hereto (App. 1a-16a).

The unpublished Opinion of the United States Court of Federal Claims in *Martin et. al. v. The United States*, Docket No. 16-cv-01159 filed May 19, 2017 granting Defendant's Motion to Dismiss Plaintiffs' Complaint for Lack of Jurisdiction, is set forth in the Appendix hereto (App 17a-25a).

The unpublished Judgment in *Martin et. al. v. The United States*, Docket No. 16-cv-01159 filed May 22, 2017, dismissing Plaintiffs' Complaint without prejudice for lack of jurisdiction. (App 26a).

JURISDICTION

The order of the United States Court of Appeals for the Federal Circuit affirming the United States Court of Claims judgment of dismissal without prejudice was entered on July 11, 2018. (App. 1a-16a).

This petition for writ of certiorari by Hugh Martin, Sandra Knox-Martin, Kirkland Jones, and Theron and Sherilyn Maloy is filed within ninety (90) days of that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, Section 1:

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish ....

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 1491:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

43 U.S.C. § 932 (successor to Revised Statutes Section 2477):

> Sec. 8. And be it further enacted, that the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Mining Act of 1872, R.S. § 2328 derived from act May 10, 1872, ch. 152, §9, 17 Stat. 94:

> Sec. 9. That sections one, two, three, four, and six of an act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining-claims now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act; and all patents for mining-claims heretofore issued under the act of July twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this act where no adverse rights exist at the time of the passage of this act.

STATEMENT

This case arose after a devastating forest fire in Northern New Mexico burned through large swaths of the Santa Fe National forest in June 2011. Subsequent

rains in the burned areas led to flooding in those areas and destroyed certain roads upon which inholding parties historically relied to access their private property lying within National Forest boundaries. Some of those properties, such as the properties at issue in this case, include mining claims.

The United States Forest Service notified Petitioners in August 2011 that the two roads at issue in this case, so-called Forest Roads 89 and 268, were rendered impassable. Because of the condition of portions of those two roads, the Forest Service stated that it would not permit vehicle access on the damaged portions of the road, but it would allow access to inholding properties via hiking. On December 29, 2011, the Forest Service issued an Order restricting activities within the Las Conchas fire area, including FR 89 and FR 268. (App. 111a-114a; 115a-118a). The Forest Service determined that "[t]hese roads will not be reconstructed in the foreseeable future, because repeated flooding events will continue until the watersheds recover." (App. 77a, 90a, 210a). On April 13, 2012, the Forest Service notified the affected landowners, including Plaintiffs, that it would continue to close FR 89 and FR 268 "to public access for the foreseeable future." (App. 115a-) The Forest Service explained the available options for affected landowners to "establish future vehicular access to [their] property," as follows:

> 1. A new (reconstructed) road over existing alignment. You and your neighbors can collectively work together to reconstruct the old road over more or less the same alignment. We can facilitate the creation of a formal road

> association, which would then be granted a recordable private road easement which would ensure legal and physical access to your private land.
>
> 2. A new road over a new alignment. You and your neighbors could work together to establish a formal road association (as above) and build a road over a new route which we would help you choose. Unfortunately, given the topography of these canyons, new road alignments will be challenging to locate. A private road easement would be granted to the newly formed road association in the same manner as above.

(App. 48a-49a, 116a-117a).

Subsequently, petitioners, through counsel, sent a letter to the United States Forest Service asserting ownership of private easement rights pursuant to R.S. 2477[1] in the roads in question that predate the creation of the Forest Service, and advising the Forest Service that they intended to rely on their private-property rights to begin road repair in the near future. (App. 41a). In response, the Forest Service stated that it disagreed with Petitioners' assertion of rights under R.S. 2477, that private inholders were subject to "reasonable regulation" regarding their access, and that any attempts to re-construct roads without adhering to the Forest Services' regulations, including their permitting process, would result in criminal and civil

[1] It is not necessary for the Court to analyze or decide at this stage the effect of R.S. 2477. The Court below assumed, *arguendo*, that Plaintiff had a private easement in the roads in question pursuant to R.S. 2477.

sanctions. In its response letter, the Forest Service specifically warned: "[A]nyone using national forest lands in an unauthorized manner may be subject to criminal and civil penalties under federal law." (App. 41a-42a, 51a-54a). Unquestionably, the Forest Services' position from the beginning was that the roads in question constituted "national forest lands" and petitioners would be required to go through permitting and, potentially, seeking and obtaining an easement from the forest service, for access to their mining claims.

Given the impasse between the Forest Service and Petitioners, Petitioners chose to file this lawsuit in the United States Court of Claims asserting that they should not be required to submit to what they believe to be a futile and onerous special permitting process to rebuild the roads over which they already own a private property interest that pre-dates the establishment of the National Forest service. The District Court dismissed that lawsuit without prejudice on the grounds that it was not ripe for adjudication of the taking because Petitioners had not followed through with the permitting process. The United States Court of Appeals for the Federal Circuit agreed, holding that Petitioners must exhaust the permitting process before an adequate record exists for the courts to determine whether a compensable taking has occurred. Neither the Court of Claims nor the United States Court of Appeals for the Federal Circuit took a position regarding the validity of Petitioner's assertion of ownership of R.S. 2477-based easements.

REASONS FOR GRANTING THE PETITION

I. SUMMARY OF THE ARGUMENTS

This Case demonstrates that some refinement is needed with this Court's taking's jurisprudence to accommodate a set of circumstances that is common in states in which the Federal Government owns large swaths of territory. First, in instances where parties assert R.S. 2477 rights, existing ripeness jurisprudence is poorly suited to determine whether a party asserting a "regulatory" taking has a ripe claim. The Government insists that Petitioners must follow "reasonable regulations," apply for a special use permit, and pay the attended costs and fees, before being allowed to rebuild the roads which allow access to their private inheld properties. To the extent the Court's ripeness jurisprudence requires a party to go through the motions of this permitting process even while rejecting its propriety, those doctrines should be refined and limited. Moreover, it is not fair to treat this case as purely a regulatory taking. Because of the nature of the rights Petitioners assert, Petitioner contends that a per se taking has been alleged. The Court should grant this Petition to clarify the difference between a regulatory taking and a situation in which asserted regulation is really a proxy for physical occupation of the land by the Government.

II. THE PERMITTING PROCESS THAT THE UNITED STATES FOREST SERVICE REQUIRES FOR PETITIONERS TO RE-CONSTRUCT THEIR ROAD ACROSS THEIR PRIVATE RIGHT OF ACCESS UNDULY BURDENS PETITIONERS' ALREADY-EXISTING PRIVATE PROPERTY RIGHTS.

The decisions below lay bare an area in which clarity is needed with respect to this Court's takings jurisprudence. Petitioners submit that the resolution of this lawsuit requires the adjudication of the following questions: (i) whether Petitioners' assertion of private property easements pursuant to R.S. 2477 are valid; and (ii) whether the United States' refusal to recognize those rights and its concurrent insistence that Petitioners treat their private easements as national forest lands and follow the permitting processes in place for using *forest lands*, constitutes a taking of private property requiring just compensation. The lower courts have ignored both of these questions by citing decisions of this Court articulating the ripeness doctrine, under which Petitioners should be required to follow the permitting procedures before a taking can be asserted. Those permitting procedures, however, are not appropriate in a setting where Petitioners propose to use their own property, including their own easements, for access to its inholding estates. The United States' assertion that it can require "reasonable" regulations rings hollow in this setting, because the very existence of the permitting process, which cannot be anything but costly, is unreasonable as against these private land owners. Petitioners should not have to pay any fees or receive any permits from

the United States for access across their private easements to reach their private inheld mining claims.

This Court is not being asked here to resolve the question of the existence of R.S. 2477 rights or even whether a taking has occurred. Rather, the basis for this Petition is that the ripeness requirements asserted by the Respondent and the honorable Courts below are not appropriately applied where such a right is being asserted, and the Government's insistence on its regulatory-based permitting process is incompatible with the existence of such rights. The Court of claims is positioned to hold a trial on the merits on the factual issues and to evaluate existing law with reference to these claims. Furthermore, the posture of this case is currently dismissal under Rule 12. This means that the facts asserted by Petitioners are assumed true. Thus, this Court can decide, as a matter of law, whether the pleaded facts allege a ripe taking so that the matter can move forward in the Court of Claims. Because the Complaint alleges that the United States has made extortionate demands on Petitioners, such a taking has been pled.

The Court has defined multiple theories for regulatory takings. For example, the Court has recognized that government action depriving an owner of "all economically beneficial use" of property can constitute a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Moreover, under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), a property owner may establish a taking based on regulations that fall short of depriving owners of all economic use of property, but which have significant adverse economic impact. *Id.* at 124. Finally, this Court

has recognized that some special conditions may result in takings. The unconstitutional conditions test allows land use applicants to challenge development permit conditions on the basis that there is no approximate nexus (i.e., reasonable relationship) between the condition and development. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

Discussing unconstitutional conditions, this Court has explained: "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596, 186 L. Ed. 2d 697 (2013). What the United States proposes here similarly impermissibly burdens private property rights, even absent a physical occupation of the property (although in this case, Petitioner believes such an occupation has occurred as well). *Koontz* speaks specifically about permitting requirements:

> [O]ur decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By

> conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.

Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. at 2594.

In the Court of Claims and in the Federal Circuit, Petitioner argued that the Forest Service was requiring Petitioners to relinquish their R.S. 2477 claim in order to participate in the permitting process. Respondent now disavows that it is imposing such a requirement, and it asserts that it is merely imposing reasonable regulation. Thus, according to Respondent, Petitioners must submit to the special use permitting process and find out what all of the requirements will be, or have the permit denied, before they can even assert that a taking has occurred. This Court has held in other cases that, "[A] takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001)(quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)). Such holdings, read without proper limitations, have induced the Government, in cases such as this one, to allow private parties to remain in limbo for indefinite periods of time without satisfactory resolution. Furthermore, what constitutes a "final" agency action is not clear. If a private owner contends that the mere

application of a regulatory scheme is inappropriate as applied to that owner, it appears that the Government's insistence that the scheme does apply is final enough for takings analysis.

Stated plainly, why should a party that asserts private ownership in a historical easement that predates the Forest Services' jurisdiction over particular lands, be required to obtain any permit or pay any fee at all to the United States to repair a road across those asserted private easements? The answer must be that the United States, unlike some other owner of burdened land, claims a special right to regulate private easements burdening its lands (even easements that predate its jurisdiction over the lands in question) and that special right to regulate by implication reduces the property ownership interests of the private easement owners.

The existing ripeness doctrines undermine the ability of parties to assert their rights in situations such as this one. Very little case law has been allowed to develop regarding R.S. 2477, and private property owners usually find themselves caught in costly and seemingly unending quagmires trying to exercise or maintain their rights in property, the legitimacy of which the United States refuses to recognize.

It is convenient to attempt to bypass answering these questions by simply imposing a ripeness requirement, but as a practical matter, the permitting process is, without dispute, costly, burdensome, and a waste of multiple parties' resources. All of the factual development needed to determine whether a taking has

occurred can be done in this case with the current state of things.

III. THE UNITED STATES HAS PHYSICALLY OCCUPIED PETITIONERS' PROPERTY FOR PURPOSE OF A TAKINGS CLAIM.

This case has largely been treated as one involving a regulatory taking. There are, however, multiple theories under which this Court recognizes takings, and the Complaint below alleges both a regulatory and a physical taking. Under existing jurisprudence, there are "per se" takings in which the Government purports to physically occupy or physically "invade" the land. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982). Petitioners allege that the United States Forest Services' explicit denial of an R.S. 2477 right, and its characterization of the roads in question as national forest lands, indicates that the Government has occupied the easements and claims ownership of them in a way that is openly adversarial to the ownership interests that Petitioners assert. Relying primarily on *Estate of Hage v. United States*, 687 F.3d 1281(2012), and earlier cases such as *Howard W. Heck & Assoc., Inc. v. United States*, 134 F.3d 1468 and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Lower Court concluded that no regulatory taking can be ripe in claims such as the ones brought by Petitioners until "a permit is both sought and denied." A physical taking was assumed not to have occurred, even though the Federal Circuit accepted, *arguendo*, that an R.S. 2477 right exists. Assuming an R.S. 2477 right exists, however, means that the Federal Circuit accepted the proposition that owners of R.S. 2477 property rights must acquiesce to the Federal

Government's assertion of ownership in those same property rights. Even if the Government now argues that Petitioners may participate in the permitting process without waiving R.S. 2477 rights, the reality is that the Government contends and will always contend that the roads in question are, in fact, U.S. Forest roads, and that the U.S. Forest must grant an easement to Petitioners to permit "reasonable" access. By asserting an ownership in the same property, the United States has physically occupied Petitioners' property and the Complaint, accepted as true for purposes of a Fed. R. Civ. P. Rule 12 motion, alleges a ripe *per se* taking.

This Court should grant the Petition for Certiorari to clarify the circumstances under which Government action disguised as regulation in reality constitutes physical occupation of the land.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit and, ultimately, to vacate the judgment below and remand the cause to the Court of Claims for further proceedings and a trial on the merits of Petitioners' taking claim; or provide the Petitioners such other relief as is fair and just in the circumstances.

Respectfully submitted

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