

No. 21-217

IN THE
SUPREME COURT OF THE UNITED STATES

Marcy Britton, Petitioner

v.

Mayor Tim Keller, Danny Nevarez, and City of
Albuquerque, Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

**BRIEF FOR THE RESPONDENTS IN
OPPOSITION**

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Questions Presented

Respondent City of Albuquerque (“City”) runs a trap, neuter, and release (“TNR”) program, which catches feral cats, neuters and vaccinates them, then releases them back into the city. Petitioner alleges this program results in a taking because the cats enter her property after they are released by the program.

The questions presented are:

1. Can feral cats serve as an instrumentality of a government for the purposes of a paradigmatic takings claim?
2. Can a trap, neuter, and release program, which only regulates feral animals and not property, serve as a basis for a *per se* regulatory taking?
3. Can a trap, neuter, and release program administered across an entire city serve as a basis for a § 1983 claim against government actors?

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OPINIONS BELOW

The Tenth Circuit opinion, Pet. App. 1a-11a, is not published in the Federal Reporter, but is reprinted at 851 Fed. Appx. 821. The order of the district court, Pet. App. 17a-33a, is not published in the Federal Supplement, but is available at 2020 WL 1889017.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2021, Pet. App. 1a. Mindful of its duty to correct factual inaccuracies, Respondents were unable to verify Petitioner filed a petition for rehearing in the Tenth Circuit. *See* Pet. 4. On July 19, 2021, the Court issued an order permitting petitions for a writ of certiorari based on judgments issued on or before that date to be filed 150 days after judgment was entered below. Petitioner filed her petition for a writ of certiorari on August 12, 2021. Pet. i. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mindful of its duties under New Mexico law, the City runs a program which captures, sterilizes, and inoculates feral cats. *See* NMSA 1978, § 77-1-12 (2009) (requiring municipalities to “make provision by ordinance for the seizure and disposition of dogs and cats running at large and not kept or claimed by any person”). The City’s TNR program is run and managed by the City’s Animal Welfare Department. At the time Petitioner’s complaint was filed in district court, Respondent Danny Nevarez was the director of

the Animal Welfare Department. As the City's TNR program sterilizes feral cats, it necessarily suppresses the numbers of feral cats in Albuquerque and decreases the rate at which feral cats procreate. As the program inoculates feral cats, it necessarily suppresses their ability to act as disease vectors and protects the health of Albuquerque citizens.

Petitioner claims the TNR program results in a taking of her property for a couple of reasons. First, Petitioner alleges the TNR effects a taking because after catching, neutering, and vaccinating the feral cats, Respondents "abandon" them, resulting in the establishment of a feral cat colony. Pet. 2. Petitioner also alleges she was unable to sell her home because a feral cat wandered onto her property at an inopportune moment and the alleged potential buyer cited the presence of feral cats as the reason to not make an offer. Pet. 3.

On January 28, 2020, Petitioner filed her First Amended Complaint in the United States District Court, District of New Mexico, which alleged three (3) causes of action against Respondents: inverse condemnation, trespass, and nuisance. Petitioner alleged Respondents Mayor Keller and Director

Nevarez, in their individual capacities, committed partial takings of her property under U.S. CONST. amend. V, 42 U.S.C. § 1983, N.M. CONST., art. II, §20, and NMSA 1978, § 42-A-1-29 as a result of alleged damages from feral cats trapped, neutered, and released as part of the City's TNR program.

On February 26, 2020, Respondents filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on qualified immunity and other grounds. Respondents argued: (1) Petitioner failed to adequately plead sufficient facts to warrant individual liability against Respondents Mayor Keller and Director Nevarez under Section 1983 and (2) these Respondents were entitled to qualified immunity because Petitioner failed to plead facts plausibly establishing that either Mayor Keller or Director Nevarez violated a clearly established constitutional right. Respondents further argued the Fifth Amendment takings claim and alternative inverse condemnation cause of action should be dismissed because Petitioner failed to allege sufficient facts to satisfy the Fed. R. Civ. P. 12(b)(6) dismissal standard. Petitioner responded by arguing her complaint was sufficiently plausible and that individual liability was now at issue because

individual Respondents Mayor Keller and Director Nevarez had put it in dispute. The district court below rejected Petitioner’s arguments and concluded she “fails to state a claim under [the] Takings clause, because any diminution in private property value was incidental to the City of Albuquerque’s exercise of its police power, which did not regulate [Petitioner]’s property.” Pet. App. 19a. Further, the district court correctly found Petitioner “failed to adequately plead the personal involvement of the individual [Respondents] in the alleged takings violation.” Pet. App. 27a.

Petitioner appealed the district court’s decision to the United States Court of Appeals for the Tenth Circuit, arguing her complaint was consistent with other takings claims and the TNR program cannot be a valid use of the City’s police powers because it violates state law. Petitioner also argued the district court erred by engaging in a *Penn Central* analysis using the facts as pled by Petitioner. *See generally Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Finally, in response to the district court’s conclusion that she failed to plead sufficient facts to

survive a motion to dismiss, Petitioner argued she was entitled to bring a § 1983 lawsuit.

The Tenth Circuit affirmed the district court. In doing so, the court held “[t]he feral cats here are likewise beyond the City’s control and [Petitioner’s cited caselaw] provides no support for [Petitioner]’s claim.” *Id.* 8a. “[T]he question is whether the City has violated the United States Constitution’s Takings Clause[.] We hold that it has not.” *Id.* The Tenth Circuit further held “the district court did not err in assessing whether [Petitioner]’s factual allegations were sufficient to state a regulatory taking claim under the governing legal standard.” *Id.* 11a. As to the actual balancing of *Penn Central* factors, the Tenth Circuit held Petitioner “forfeited the argument that her amended complaint could survive if the district court correctly performed the *Penn Central* analysis at the motion to dismiss phase.” *Id.*

Petitioner then filed her petition for a writ of certiorari and seeks review of the decisions below. Pet. iii.

ARGUMENT

Petitioner’s claim flounders for one simple reason—she has failed to establish a taking under the

law of any federal or state court. Petitioner insists a feral cat colony is the instrumentality through which Respondents have taken possession of her property. This is in direct contravention of Tenth Circuit caselaw which holds wild animals cannot be the instrumentality through which a government physically invades property and commit a taking. *See Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1425-28 (10th Cir. 1986). Undeterred by binding precedent and common sense, Petitioner continues to assert that feral cats are somehow more akin to a flood than a herd of wild horses. Petitioner offers no cogent explanation or caselaw in support of this assertion.

To rectify her failure to allege an unconstitutional taking, Petitioner implies this Court should do one of two things. First, the Petitioner implies this Court should overturn Tenth Circuit precedent and hold that wild animals such as feral cats can serve as an instrumentality of a government and effect a taking when the feral cats physically invade property. Petitioner cites no caselaw from another circuit to justify this request and, in fact, doesn't cite any caselaw to contradict this key Tenth Circuit holding. Instead, without bothering to

explicitly ask the Court, Petitioner asks this Court to overturn well established Tenth Circuit precedent. Alternatively, Petitioner asks this Court to hold the City's TNR program violates New Mexico's criminal laws and therefore any alleged taking, regardless of a plaintiff's inability to establish a physical invasion or deprivation of economic use, is in violation of the United States Constitution. Petitioner engages in no in-depth analysis on this issue and does not cite any New Mexico caselaw drawing an analogy between the TNR program and other actions in violation of the cited criminal statute.

Petitioner Provides No Compelling Reason to Grant the Writ

“A petition for a writ of certiorari will be granted only for compelling reasons.” S CT Rule 10. Petitioner spends precious little, if any, time explaining the compelling reasons the writ should be granted. Petitioner does not allege or establish a circuit split. Petitioner does not allege an important question of federal law, which should be settled by this Court, yet was decided by another court. Petitioner alleges the courts below didn't follow the relevant decisions of this Court, but fails to make a cogent

argument demonstrating the same. Petitioner does rehash her merits arguments from below and asks this Court to reverse the lower courts by applying the same legal standard to the same allegations.

Petitioner's writ arises from the lower court's dismissal of Petitioner's complaint. Pet. App. 32a. As such, and regardless of the fact they lack internal logical consistency,¹ Respondents treat the Petitioner's well-pled allegations as true. *See Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

A. Petitioner Fails to Establish the Decisions Below Were Counter to Supreme Court Precedent

Perhaps the only effort Petitioner makes to establish a compelling reason to grant her petition is by arguing the lower courts entered a decision inconsistent with this Court's decision in *Cedar Point*

¹For instance, Petitioner simultaneously alleges Respondents vaccinate feral cats, pet. 1, yet are responsible for spreading disease through the feral cats, *id.* 2. Petitioner also simultaneously alleges Respondents pick the feral cats up from the streets and neuter them, *id.* 1, yet are inexplicably responsible for creating the population of feral cats, *id.* 2. Regardless of the logical incongruities, Respondents view the allegations in a light favorable to Petitioner's claim.

Nursery v. Hossid, 141 S. Ct. 2063 (2021). Petitioner contends *Cedar Point* is “[t]he most consistent precedent that was unavailable at the time that [the] Tenth Circuit considered this case[.]” Petition 14. *Cedar Point* involved California legislation which granted labor organizations the right to access agricultural employer’s property. *Cedar Point*, 141 S. Ct. 2069. The City’s TNR program does not require property owners to allow feral cats onto their property. More tellingly, Petitioner does not even allege the City’s TNR program requires property owners to permit cats onto their property. Petitioner has made no claim the City’s ordinance compels property owners to allow anyone or anything onto private property. *Cedar Point* is illustrative in this case because it highlights Petitioner’s failure to successfully allege an unconstitutional taking.

Petitioner is mistaken when she contends the *Cedar Point* analysis she cites supports her position. Pet. 14. The analysis cited in the petition occurs **after** a physical invasion has been established. *Id.* 2074 (“The regulation appropriates a right to physically invade the growers’ property—to literally ‘take access,’ as the regulation provides[.] It is therefore

a *per se* physical taking under our precedents.”). The opening sentence of the quoted text, even out of context, clearly indicates this and states “[n]one of these considerations undermine our determination that the access regulation here gives rise to a *per se* physical taking.” 2079-80. This sentence clearly establishes the *Cedar Point* court had already determined there was a physical invasion and had moved on to a balancing test to determine whether it constituted a compensable Fifth Amendment taking. Here, no such determination was made by the courts below because Petitioner failed to allege facts sufficient to demonstrate Respondents physically invaded her property. Petitioner’s reliance on this analysis to establish a taking in the first place is therefore mistaken and contrary to the law she herself cites.

B. Petitioner Fails to Establish a Circuit Split or any Conflict of Law

Petitioner does not allege a circuit split on the questions presented. Petitioner cites no conflicting caselaw from another circuit, state court of last resort, or even a district court. Instead, Petitioner implicitly asks this court to overrule the Tenth Circuit, which

has held wild animals, even when regulated, are not an instrumentality of the regulating government and the government does not physically invade property when the wild animals wander onto it. *Mountain States*, 799 F.2d 1425-28.

Mountain States presents a stronger factual predicate for a taking because the law at issue in *Mountain States* subjected property owners to potential criminal liability if they interfered with or tried to remove the wild horses from their property. *Id.* 1425. This and the alleged failure of the federal government to remove the horses from property in *Mountain States* resulted in the horses grazing on the land, eroding the topsoil, and consuming “vast quantities of forage and water.” *Id.* As such, landowners were explicitly prohibited from expelling wild animals from their property. Even this stronger legislative schema did not constitute a taking.

Petitioner fails to allege any such penalties are at issue with the City’s TNR program. Even if the Court were to overrule *Mountain States* and hold feral cats can function as the instrumentality of a government for the purposes of establishing a taking, Petitioner still fails to allege that the TNR program

prevents her from removing the feral cats from her property, which was the case in *Mountain States*. Accordingly, the City's program, even as alleged, constitutes a far lesser burden than what was affirmed as a lawful act in *Mountain States*.

C. Petitioner Fails to Establish the Courts Below Misapplied the Law

Petitioner does not claim the lower courts improperly stated the law. Instead, Petitioner appears to argue the lower courts misapplied the law when it looked to the actions of the feral cats instead of Respondent's actions. Pet. 13. Indeed, as Petitioner herself argues, a party making a takings claim must focus on the actions of the governmental agency alleged to have made the taking. *Fallini v. United States*, 56 F.3d 1378, 1383 (Fed. Cir. 1995). The *Fallini* court further clarified this principle: "[t]he only governmental action that could constitute a compensable taking in this case is the government's directive forbidding the Fallinis from shooing the horses away from the water that the Fallinis have produced at their developed water sources." *Id.* (continuing from the very sentence cited by Petitioner). Petitioner alleges no such directive in this

case and one does not exist. The requirement to focus on the actions taken by the government is, fundamentally, why Petitioner's taking claim fails and one of the many reasons the courts below ruled against her. Pet. App. 21a-22a (focusing on the government's lack of liability for the actions of wild animals); Pet. App. 24a ("Here, [Respondents] do not regulate Plaintiff's property for the benefit of the public. Nor do they regulate [Petitioner]'s property at all.").

Now however, Petitioner appears to have partially recognized the fatal flaw in her takings argument and desperately seeks to recast her arguments below as something entirely different. Petitioner did not take care when recycling her previous arguments into her petition and the duplicity is evident in the petition. Petitioner blames the presence of a feral cat on her property for an incident where she failed to sell her home. Pet. 3. Petitioner discusses the "physical damage caused by colonies of feral cats." Pet. 13. Petitioner talks about the "the damage and blighting of her property [caused] by releasing a large population of feral cats[.]" Pet. 17. Petitioner argues Respondents blighted "her private

property with the extreme nuisance of establishing a feral cat colony over the top of her quiet enjoyment of her property.” Pet. 20. Petitioner argued in the district court below “that the feral cats, released by the City ‘in the vicinity of the property in question,’ constitutes a ‘physical occupation’ of her property by the Government.” Pet. App. 20a. Petitioner’s claim that she focuses on the actions of Respondents is inconsistent with her theory of the case and the arguments she has made before this Court and the courts below.

Faced with the fact she failed to allege an unconstitutional taking, Petitioner wants to simultaneously argue the courts below improperly focused on the actions of the feral cats while using those very same actions to justify her argument that Respondents are responsible for the alleged diminution of her property value.

Focusing on the actual actions of the City as alleged by Petitioner makes it clear there was no taking. The City picks up feral cats by trapping them. Pet. 1. The City neuters and vaccinates the feral cats. *Id.* The City then releases the feral cats by dropping

them off where they were caught or at another location. *Id.* 1-2.

There are no allegations the City requires property owners to house the cats. There are no allegations City personnel invade private property. There are no allegations the cats are dumped *en masse* on specific privately-owned properties. There are no allegations the City's TNR program prevents property owners from chasing the cats from their property or otherwise engaging with the cats and preventing them from entering their property. By focusing on the City's actual actions, it is abundantly clear why Petitioner's claim fails—government action is simply not responsible for any loss of property value or any invasion of her property.

Lastly, Petitioner alleges the courts below misapplied the law because the TNR program is in violation of a New Mexico criminal statute. Pet. 15. Petitioner argues the Respondents “abandon” feral cats in violation of NMSA 1978, Section 30-18-1 (2007), and therefore the TNR program is inconsistent with state law and cannot be a valid exercise of the City's police powers. *Id.* 15-16. This argument is part of Petitioner's regulatory non-*per se* argument, which

she waived by failing to preserve it for the Tenth Circuit's review. Pet. App. 11a (citing *Penn Cent. Transportation Co. v. City of New York*, 438 U.S. 104 (1978)). Petitioner makes no argument to establish this issue was properly preserved before the Tenth Circuit and has therefore failed to properly preserve this argument for this Court's review. For this reason alone, this Court should decline to give Petitioner another bite at the apple by considering this argument.

Preservation issues aside, a plain reading of Section 30-18-1 exposes the logical flaw in Petitioner's interpretation. Section 30-18-1 specifically excludes from its ambit "rodent or pest control" and "other similar activities not otherwise prohibited by law." Section 30-18-1(I). The City's TNR program neuters feral cats so they can't reproduce and vaccinates them so they're less likely to spread disease. The TNR program is quintessentially a pest control program and failing that, is definitively one of many "similar activities not otherwise prohibited by law." Petitioner cites no New Mexico caselaw which contradicts this plain reading of the statute or caselaw, which even implies these plainly applicable exceptions are

inapplicable to pest control ordinances such as the City's TNR program. To the contrary, the City is required to institute a program to control the population of feral animals. *See* NMSA 1978, § 77-1-12. Instead, Petitioner expects this Court to summarily conclude the Respondents, including two individuals, have violated a state criminal law. Then Petitioner wants this Court to allow a takings claim to proceed even though it fails to allege Respondents are responsible for a legally cognizable physical invasion or deprivation of all economic value of her property. In support of this expectation, Petitioner provides one paragraph of argument and no supporting citation which can be used to support her contention the Respondents' TNR program is in violation of a New Mexico criminal statute.

The courts below properly applied the law and Petitioner's arguments to the contrary fail on the grounds above. Even if Petitioner is right and the courts below misapplied the law, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S CT Rule 10. Petitioner does not claim the courts below

improperly stated any rule of law and her arguments the courts below misapplied the law are without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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