

No. 17-1198

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**In The  
Supreme Court of the United States**

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

*Petitioners,*

v.

SURFRIDER FOUNDATION,

*Respondent.*

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**On Petition For Writ Of Certiorari To  
The First Appellate District Court Of Appeal  
Of The State Of California**

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**BRIEF OF *AMICI CURIAE* CALIFORNIA  
ASSOCIATION OF REALTORS® AND NATIONAL  
ASSOCIATION OF REALTORS® IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

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JUNE BABIRACKI BARLOW, ESQ.  
Senior Vice President and General Counsel  
*Counsel of Record*

JENNY Y. LI, ESQ.  
Assistant General Counsel

DAVID RADMORE, ESQ.  
Staff Attorney

CALIFORNIA ASSOCIATION OF REALTORS®  
525 South Virgil Avenue  
Los Angeles, California 90020-1403  
Telephone: (213) 739-8200  
juneb@car.org

*Counsel for Amicus Curiae,  
California Association of REALTORS®*

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**BRIEF OF *AMICI CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rule 37.2 of the Rules of this Court, *Amici curiae*, the California Association of REALTORS® (hereafter, “C.A.R.”) and National Association of REALTORS® (hereafter, “NAR”) (collectively, hereafter, “REALTOR® ASSOCIATIONS” or “*Amici curiae*”), submit this brief in support of the petitioners, Martins Beach 1, LLC and Martins Beach 2, LLC (hereafter, “Petitioner”).<sup>1</sup>



**IDENTITY AND INTEREST OF *AMICI CURIAE***

C.A.R. is a nonprofit, voluntary, real estate trade association, incorporated in California, whose membership consists of approximately 180,000 persons licensed by the State of California as real estate brokers and salespersons, and the local associations of REALTORS®<sup>2</sup> to which those members belong. Members of

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<sup>1</sup> REALTOR® ASSOCIATIONS have informed the parties of the intent to file this *amicus* brief at least 10 days before filing. The parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *Amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

<sup>2</sup> The term REALTOR® is a federally registered collective membership mark which identifies a real estate professional who is a member of the National Association of REALTORS® and subscribes to its strict Code of Ethics.

C.A.R. assist the public in buying, selling, leasing, financing, and managing residential and commercial real estate. C.A.R. advocates for the real estate industry by bringing the perspective of the industry as a whole, in contrast to the singular perspective of a particular constituent or litigant. Per C.A.R.'s Mission Statement,<sup>3</sup> one of the ways in which C.A.R. serves its membership is through collective action that promotes real property ownership and the preservation of private property rights. C.A.R. regularly evaluates legislation and regulations related to property rights, land use, zoning, environmental and development issues, and often participates as *amicus curiae* in relevant court cases. In that regard, in supporting the preservation of landowners' constitutional rights, C.A.R. has participated in several land use and takings cases, including as *amicus curiae* in the seminal case of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

NAR is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and

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<sup>3</sup> "The purpose of the CALIFORNIA ASSOCIATION OF REALTORS® is to serve its membership in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses successfully with integrity and competency, *and through collective action, to promote real property ownership and the preservation of real property rights.*" (emphasis added). C.A.R. Mission Statement, at [www.car.org/aboutus/mission/](http://www.car.org/aboutus/mission/).

best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. NAR's membership is comprised of 54 state and territorial Associations of REALTORS®, including C.A.R., approximately 1,200 local Associations of REALTORS®, and more than 1.2 million REALTOR® and REALTOR-ASSOCIATE® members.



### **SUMMARY OF THE ARGUMENT**

The California courts have unconstitutionally compelled Petitioner to open his private property to the public indefinitely and continue operating a money-losing business providing public access to Martins Beach. The California Court of Appeal interpreted the California Coastal Act (Cal.Pub.Res.Code §§ 30000-30900) so broadly that the property owner has been unconstitutionally deprived of his private property rights, including the right to exclude others, without any compensation. The REALTOR® ASSOCIATIONS are concerned that this violation of the Takings Clause will encourage the California Coastal Commission to impose similar unconstitutional controls over the large number of properties located along the California coast, and will also encourage similar restrictions on landowners by other government agencies throughout the United States.



## ARGUMENT

### **I. THE CALIFORNIA COASTAL ACT CANNOT CONSTITUTIONALLY BE APPLIED TO COMPEL A PROPERTY OWNER TO OPERATE A BUSINESS AND PROVIDE INDEFINITE PHYSICAL ACCESS TO PRIVATE PROPERTY.**

After Petitioner closed and locked his gate, the trial court compelled Petitioner to open his private property to members of the public by permitting public travel on Petitioner's private property, and to operate a failing business against his will by providing convenient beach access to visitors for a \$2 entry fee, the same price charged by the previous owner nearly half a century ago in 1973. (Petition, p. 7-8). Petitioner must grant public access at that specified low price until some unknown time in the future when Petitioner might be able to obtain a California Coastal Development permit (hereafter a "Permit") relieving Petitioner from keeping his gate open and operating his unwanted business. The REALTOR® ASSOCIATIONS urge this Court to grant the Petition for Writ of Certiorari to remedy the California Court of Appeal's sanction of multiple violations of Petitioner's constitutional rights by labeling such a blatant taking as a "temporary" physical taking requiring no compensation. The REALTOR® ASSOCIATIONS are gravely concerned that in issuing such an order, the Court of Appeal casually and erroneously minimized the effect of the judgment upon Petitioner that mandated he open his private property to physical access without even the

freedom to charge enough to cover costs of a business he does not want to operate. Contrary to the Court of Appeal's assessment, the real effect of the trial court's injunction is an immediate substantial and unconstitutional taking of Petitioner's private property rights.

In applying the California Coastal Act very broadly to uphold the trial court's injunction, the Court of Appeal relied on language in section 30001.5(c) of the Coastal Act and concluded:

“[M]aximizing access is the goal, with the constitutional rights of property owners as the outside limit on access. The Legislature's determination to define “development” broadly and require consideration of property rights during the permitting process is sensible because it allows for public participation and the development of a full record regarding the nature and extent of the private and public property rights at stake.” *Surfrider Foundation v. Martins Beach 1, LLC et al.*, 14 Cal.App.5th 238, 221 Cal.Rptr.3d 382 (Ct. App. 2017), *review denied* (Oct. 25, 2017), at 253-54.

Although the Court of Appeal acknowledged the existence of a constitutional outside limit, it proceeded to run roughshod over that limit. Moreover, after overrunning that constitutional boundary – and even acknowledging the trial court's order allowing public access is indeed a physical taking – the Court of Appeal then determined the taking was “temporary” rather than a “permanent” *per se* physical taking requiring compensation to the owner. This interpretation of the



California Coastal Act is constitutionally impermissible and ultimately violates the property owner's constitutional property rights and freedoms, including the freedom to not run a business.

The Court of Appeal's reasoning disrespects fundamental and essential private property rights – such as the right to exclude unwanted visitors and the right to choose whether or not to operate a business involving public entry onto one's land.

Petitioner's brief discusses the current division among state and federal courts when evaluating *per se* physical takings cases and the reasons why this division exists. In light of this judicial split, it is appropriate for this Court to grant the Petition to clarify whether a compulsory public-access easement of indefinite duration is a *per se* physical taking and whether the manner of application of the California Coastal Act violates the Takings Clause, the Due Process Clause, or the First Amendment.

Additionally, the REALTOR® ASSOCIATIONS submit that acceptance of this Petition is timely and appropriate. As was noted in the Petition (Petition, pp. 12, 29-30), the Court of Appeal here decided that Petitioner's objection to the Coastal Development permit requirement as a violation of the Takings Clause was "unripe." *Surfrider Foundation*, 14 Cal.App.5th at 256-58. In June 2009, Petitioner filed an action for declaratory relief against San Mateo County and the Coastal Commission, but his attempt to obtain a judgment stating whether a Permit was required was dismissed

by the trial court as unripe. (Petition, at p. 8). In September 2011, after the Coastal Commission sent Petitioner a Notice of Preliminary Determination of Violation regarding the closing of his gate, Petitioner requested that the County issue a Final Staff Determination of Violation which would allow him to seek a court determination on the issue. But the County never provided a Final Staff Determination of Violation. (Petition, at p. 8-9).

This Court recently accepted for review the case of *Rose Mary Knick v. Scott Township, Pennsylvania*, 862 F.3d 310 (3d Cir. 2017). The petitioner in that case is challenging a township's ordinance requiring a private property owner to provide public access to her land, based on claims that her property sits on ancient burial ground. Among other things, the *Knick v. Scott Township* case examines the ripeness rule in takings claims and this Court's holding in *Williamson Cty. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985). Similar to the *Knick v. Scott Township* case, this case raises important Fifth Amendment questions which are worthy of review and resolution by this Court.

**II. THE COASTAL COMMISSION'S CONFISCATORY POLICIES HAVE BROAD IMPLICATIONS FOR CONSTITUTIONAL PROPERTY RIGHTS WHEN A PROPERTY IS NOT BEING "DEVELOPED" BUT IS MERELY BEING PROTECTED FROM TRESPASSERS.**

California homeowners living within the approximately 1.5 million acres of coastal land understand that improving property (and in some cases even repairing it) may require permits. But this case presents a compelled grant of public access to private property by taking away the ability of a property owner to simply lock a gate and go out of business, thus protecting lawfully owned property. It is one thing to require a permit to improve or change property by adding buildings, paving or other structural changes. It is another to require a permit to prevent public access to private property or otherwise face thousands of dollars in daily fines. The California Court's immense understatement of the negative impact upon the property owner (*i.e.*, there has only been a "temporary" physical taking, which is not compensable) who must maintain public access or face extreme financial penalties can hardly be called "temporary." It is not forbearance from construction, but it is compulsion to operate a business – at a loss, no less – which requires funds every day it is open. The Court of Appeal's decision requires a property owner to choose his or her poison: maintain a business that is losing money daily or face immense fines daily; comply with the California Coastal

Commission's demands and lose money or engage in expensive litigation.

If allowed to stand, the Court of Appeal's decision will be financially devastating for the inhabitants of the California Coastal Zone, which encompasses a huge area of California. According to the Los Angeles County Department of Regional Planning:

“[The California Coastal Zone] encompasses approximately 840 miles of California coastline and about 287 miles of shoreline around nine offshore islands. It extends three miles into the ocean, bound by the State's seaward boundary of jurisdiction. The inland boundary of the Coastal Zone can vary, as it is measured from the Mean High Tide Line that ranges from a few hundred feet in urban areas, to up to five miles in rural areas. In California, 15 counties and 61 cities are located in whole or in part in the Coastal Zone.” (<http://planning.lacounty.gov/coastal>).<sup>4</sup>

The large number of California counties and cities situated within the Coastal Zone show that the number of properties that might be affected by the holding in this case is enormous. These thousands of other homeowners, most of whom likely do not have the same financial resources as Petitioner and most of whom would be unable to litigate a case for years, are subject to the same burdens as Petitioner. Running a business commonly involves the hiring and managing of employees, the purchasing of liability and other

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<sup>4</sup> See also Cal. Pub. Res. Code section 30103.

types of insurance, the maintaining of facilities, adhering to health and safety laws, and the need for the business owner to devote time, energy, and attention to ongoing business operations. Most homeowners are ill-equipped or unable to shoulder such business responsibilities; however, under the Court of Appeal's decision, these types of significant burdens could be similarly heaped upon other California property owners living within the California Coastal Zone whenever they might wish to engage in reasonable activities involving their private property (e.g., closing an entry gate, hiring security guards, painting over a sign located on their property). The Court of Appeal itself recognized the wide-ranging impact of this case when, in the portion of its opinion granting attorneys' fees to Respondent, the Court stated:

“ . . . [T]he present action resulted in a legal interpretation of the term “development” in the Coastal Act that, by virtue of the present decision, will have precedential value. The significance of that legal determination is attested by the amicus curiae briefs filed in support of both parties on appeal. Amicus the Pacific Legal Foundation argues, for example, “This [c]ourt’s decision will extend far beyond this case and may affect many ordinary coastal homeowners.” *Surfrider Foundation*, 14 Cal.App.5th at 279.

The Court of Appeal's decision encourages unreasonable, unconstitutional levels of monitoring and control over property owners in the California Coastal Zone and their use of their private property. Apart from

influencing governmental conduct in relation to the large number of properties located within the California Coastal Zone, the decision below may also embolden other jurisdictions within and outside of California to impose limitations and restrictions on land that deprive property owners throughout the United States of their constitutional rights.

Although the Coastal Act provides various enforcement tools to the Coastal Commission and local governmental authorities, for the stated purposes of protecting and enhancing California's coastline and maximizing public access to beaches, those enforcement tools cannot be wielded in a manner that violates constitutionally protected rights of property owners. The Court of Appeal's erroneous holding interprets the Coastal Act so broadly that Petitioner now is burdened by an onerous injunction which violates Petitioner's constitutional rights. Review by this Court is needed to correct the decision below and protect the valuable private property rights of Californians and others.



**CONCLUSION**

For the reasons stated in the Petition, and all of the foregoing reasons, REALTOR® ASSOCIATIONS respectfully request that this Court grant the Petition.

Respectfully submitted,

JUNE BABIRACKI BARLOW, ESQ.

Senior Vice President and General Counsel

*Counsel of Record*

JENNY Y. LI, ESQ.

Assistant General Counsel

DAVID RADMORE, ESQ.

Staff Attorney

CALIFORNIA ASSOCIATION OF REALTORS®

525 South Virgil Avenue

Los Angeles, California 90020-1403

Telephone: (213) 739-8200

juneb@car.org

*Counsel for Amicus Curiae,*

*California Association of REALTORS®*