No. 17-1198

In the
Supreme Court of the United States

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

v.

SURFRIDER FOUNDATION,
Respondent.

On Petition for Writ of Certiorari to the First Appellate District Court of Appeal of the State of California

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The decision below holds that a compelled public-access easement over Martins Beach is not a *per se* taking because only "permanent" physical takings are *per se* takings. That holding deepens an already-entrenched division among the lower courts. Rather than defend that decision or deny that split, Surfrider prefers to recharacterize the decision and reframe the question as whether injunctions requiring property owners to obtain permits to exercise core ownership rights constitute takings. But what the lower court actually held is that a "temporary" physical taking—whether accomplished through an injunction or otherwise—is not a *per se* taking, and that holding implicates a split that is both entrenched and consequential, as the raft of amicus briefs underscores.

Surfrider is equally non-responsive on the merits, never even trying to explain how the decision below can be squared with this Court's many cases treating "temporary" takings as *per se* takings. Instead, Surfrider places its chips on *Williamson County*'s finality requirement. That is a losing bet for two reasons. First, as every court of appeals agrees, the finality requirement is *by definition* satisfied in a physical takings case, because the physical invasion itself is final government action. There is simply nothing unripe about having the government in your backyard or strangers on your property. Second, ripeness is a doctrine that constrains plaintiffs, not defendants. Where, as here, a plaintiff obtains a state-court injunction denying the defendant's right to exclude strangers from its property, or to shut down or

change the pricing or hours of operation of its money-losing business, the defendant may assert its constitutional defenses to resist the requested relief, which itself would inflict the constitutional injury.

Surfrider's vehicle arguments are unavailing too. Surfrider litigated this case, and the court below decided it, on the premise that there is no public right of access to Martins Beach—and a state court has now entered a final judgment confirming as much. Not only has the Coastal Commission participated in this case as an amicus, but it is presently seeking to impose millions of dollars in coercive penalties against petitioner for the same alleged Coastal Act violations. Finally, the hypothetical possibility that the government will concede the taking and provide just compensation exists in *every* takings case and is certainly no obstacle to review.

The bottom line is that the split is real, and the question whether the government can avoid *per se* analysis by limiting the duration of its physical takings is enormously important. The right to exclude is the core property right protected by the Takings Clause, as is the right to shut down or alter the terms of a money-losing business without obtaining a permit. Those rights are obliterated by the decision below and its unconstitutional interpretation of the Coastal Act. Certiorari is warranted.

I. The Decision Below Deepens A Split Over Whether A Physical Invasion Must Be Permanent To Be A *Per Se* Taking.

The petition described an entrenched split among state and federal courts over whether a physical taking must last forever to be *per se* compensable.

Pet.16-22. Surfrider responds with misdirection, but little else. While its brief has a heading titled "There Is No Division Of Authority," Opp.14, Surfrider never actually addresses the division discussed in the petition beyond trying to distinguish a single Federal Circuit decision. It does not even *cite* any state court cases, let alone claim that the state court cases in the petition do not conflict. The conflict is thus not only deep, longstanding, and intolerable, but undisputed.

Surfrider does argue that there is no split on a *different* question—namely, "whether an injunction that lasts only until a decision on a permit application qualifies as a *per se* taking." Opp.14. But the decision below did not turn on that question—the California court did not rule that the injunction was not a *per se* taking because of something specific to injunctions or the permitting process. It held that it was not a *per se* taking because, "for a physical invasion to be considered a per se taking, it must be permanent." Pet.App.50. The decision below turns squarely on the permanent/temporary question, which is the question presented and the one on which the lower courts are intractably divided.

Surfrider suggests that *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), has been undermined by subsequent cases. Opp.15-17. Surfrider is mistaken. The very language Surfrider quotes from *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), reaffirms *Hendler*'s holding that the determinative factor in physical takings cases is "the *character* of the government intrusion," not its "temporal duration." *Id.* at 1356. While *Boise Cascade* noted that *Hendler* had been "widely misunderstood,"

Opp.17, it did not retreat from *Hendler*, but instead explained why those who misunderstood it were mistaken, *see* 296 F.3d at 1356-57. The Federal Circuit has since repeatedly reiterated that "[t]he duration of a physical taking pertains, not to the issue of whether a taking has occurred, but to the determination of just compensation." *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1363 (2012).

Surfrider argues that *Loretto* established a temporal "permanence" requirement for *per se* takings. Opp.15. This is a merits argument on one side of the split, not a denial of the split, and it is not a persuasive one. Surfrider does not address the wartime cases, the historical sources, or the inconsistency of a temporal permanence requirement with *Loretto* itself. *See* Pet.22-23. Instead, Surfrider just emphasizes that *Loretto* used the word "permanent" "no less than *29 times*." Opp.15. But that sheds no light on whether *Loretto* used that word in the temporal sense, as the court below held, or to describe the legal character of the invasion, as the Federal Circuit and other courts have held. *See* Pet.25-26.

Surfrider asserts that the cases in the petition do not "involve situations where the length of the alleged taking was within the owner's control." Opp.18. But this taking is not "within the owner's control" either. Even if petitioner were to secure a permit (an outcome outside its control and highly unlikely given the history of this dispute), that would not eliminate the taking. One obtains a permit to parade on public streets. A requirement to obtain a permit before

occupying one's own property, excluding others from it, or shutting down its money-losing business is a taking. Indeed, the premise of requiring a permit "allowing" petitioner to exclude the public is that the government owns an easement over Martins Beach, and would only be *permitting* petitioner to shut down its money-losing beach-access business and exclude the public. A permit would thus confirm, not eliminate, the taking. In all events, Surfrider is wrong about the cases. In *Otay Mesa*, the property owner could have extinguished the easement by "obtain[ing] a grading permit … permitting development of all or a portion of the property." 670 F.3d at 1362. And in *Loretto*, "the landlord could have forced the removal of the cable box by ceasing to rent the building to tenants." Pet.23.

Surfrider's reliance on *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), is misplaced. Opp.17. That flooding case, which was resolved in favor of the landowner, held "simply and only" that "government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." 568 U.S. at 38. To the extent *Arkansas*' flood-specific holding (as opposed to the dicta Surfrider cites) has any application here, it confirms that "if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." *Id.* at 26. Surfrider trumpets that *Arkansas* quoted *Loretto*'s language about "permanent physical occupation," Opp.14, but that simply raises the same question about what *Loretto* meant by "permanent," which is exactly what has divided the lower courts. Pet.23.

II. The Court Should Grant Certiorari To Decide Whether The California Coastal Act Is Unconstitutional As Applied Here.

As applied to prevent petitioner from shutting down or altering the terms of its money-losing business and excluding the public from its private property, the Coastal Act's permitting requirement inflicts a physical taking. Pet.26-30. Surfrider questions petitioner's reliance on *Nollan*, *Dolan*, and *Koontz* because those cases involved permit denials. Opp.23. But in each case, the Court began from the should-be-obvious premise that "if the government had directly seized the easements" instead of conditioning a permit on their surrender, "it would have committed a *per se* taking." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). That is exactly what the Coastal Act did here: The Act "directly seizes" a public-access easement over Martins Beach and forces petitioner to continue to operate a money-losing business. That is an "obvious" *per se* taking. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987). If using the threat of a permit denial to coerce a property owner into surrendering an easement constitutes a taking, then, *a fortiori*, so does obtaining an injunction flatly prohibiting a property owner from excluding the public.

Turning to the First Amendment, Surfrider notes that "the *injunction* does not mention the billboard." Opp.22 (emphasis added). Petitioner never said it did. What petitioner said is that the *statute*, as interpreted below, compels speech by requiring petitioner to obtain a permit before changing the billboard's message. Pet.32. That is undeniably accurate, as

even Surfrider admits that the trial court ruled that "changing the messages on the billboard on the property qualifies as development under the Coastal Act, and petitioners were thus required to apply for a permit." Opp.22. Surfrider argues that requiring petitioner to seek government permission before speaking or ceasing to speak "hardly constitutes a taking," *id.*, but it does constitute a form of prior restraint, "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). And because the compelled message is to advertise the public's right to use petitioner's private property, the connection between the First Amendment and Takings Clause violations is direct.

Surfrider advances the remarkable argument that "the injunction does not require petitioner to 'run a business'" at a loss because petitioner could stop charging an entry fee and allow the public to use its property for free. Opp.1. If the answer to petitioner's complaint that he must charge antiquated and unprofitable rates is that he can always reduce the entry fee to zero and decline to perform upkeep or "maintain restrooms," Opp.21, then that just confirms that the state has achieved *two* takings—one by taking an easement, and another by preventing petitioner from recovering the costs associated with the public's use of its private property.

III. This Is An Excellent Vehicle To Resolve These Exceptionally Important Questions.

As reflected in the numerous amicus briefs, the questions presented are of surpassing importance to property owners in California and throughout the

nation. Surfrider's efforts to conjure up vehicle problems are unavailing.

A. Invoking the finality prong of *Williamson County*, Surfrider contends that petitioner's "takings claim" is not ripe because the Coastal Commission has not decided whether to grant a permit. Opp.7-10. There is a simple and complete answer to that: "An alleged physical taking is by definition a final decision for the purpose of satisfying *Williamson County*'s first requirement." *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 513 (2d Cir. 2014). Every court of appeals agrees. *See Hensley v. City of Columbus*, 557 F.3d 693, 696 (6th Cir. 2009); *Vacation Vill., Inc. v. Clark Cty.*, 497 F.3d 902, 912 (9th Cir. 2007); *Forseth v. Vill. of Sussex*, 199 F.3d 363, 372 (7th Cir. 2000); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

A final administrative decision is required in *regulatory* takings cases because until the agency has had its final say, it is impossible to determine the extent of the government interference or the degree to which expectation interests have been destroyed. *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 351 (1986). But in a physical takings case, the "final decision requirement is relieved or assumed because … the taking occurs at once, and nothing the governmental actor can do or say after that point will change that fact." *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003).

It is thus no surprise that Surfrider's ripeness cases involve only *regulatory* takings. In fact, *Boise Cascade*, which Surfrider cites repeatedly, expressly distinguishes between regulatory and physical takings, explaining that *Williamson County*'s finality

prong does not apply "where the government allegedly takes an easement in or physically occupies" private property. *Boise Cascade*, 296 F.3d at 1346 n.5. Likewise here, the physical taking "ripened" the moment the court declared a public-access easement over Martins Beach.

Surfrider's ripeness argument independently fails because petitioner is the *defendant*. Ripeness constrains *plaintiffs*, barring them from filing premature lawsuits over "uncertain or contingent future events that may not occur as anticipated." 13B Wright & Miller, *Federal Practice & Procedure* §3532 (3d ed. 2008). But when one party asks a court to grant relief that would violate the defendant's constitutional rights, the defendant is entitled to assert its constitutional defenses. There is no ripeness issue because the requested relief itself would inflict the injury. The defendant is not required to acquiesce in an unconstitutional injunction and then challenge the injunction in a separate proceeding. *Cf. Horne v. Dep't of Agric.*, 569 U.S. 513, 528 (2013) ("it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding"). Sure enough, this Court has repeatedly considered takings defenses without suggesting any ripeness concerns. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

B. Surfrider complains that "the state is not a party." Opp.10. But the Coastal Commission, represented by the California Attorney General, has participated in this case: It filed an amicus brief and

presented argument below and could do the same here.[1] Moreover, the Coastal Commission is actively pursuing an enforcement action seeking millions of dollars in penalties for the same purported violations of the Coastal Act alleged here. At any rate, this Court has decided multiple takings cases in which the government was not a party. *See, e.g.*, *PruneYard*, 447 U.S. 74; *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602 (1993). And Surfrider's professed concern about the state's ability to provide just compensation is difficult to square with its claim that the state legislature is actively considering doing just that.

C. Surfrider argues that certiorari would be imprudent because "whether the public has the right to access petitioners' property is currently being litigated in another case." Opp.2. But Surfrider litigated *this* case, and the courts decided it, on the express premise that all "prior access was permissive." Pet.App.36. Accordingly, nothing about the *Friends of Martin's Beach* ("*FOMB*") litigation could or should prevent this Court from reaching the constitutional questions. This Court routinely reviews certworthy issues even when the respondent might ultimately prevail on another ground. *See, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018); *Maslenjak v. United States*, 137 S. Ct. 1918 (2017). The Court certainly should not hesitate to do the same when, as here, the respondent disavowed the very argument on

[1] Because the California AG has been aware of this case for years and chosen not to intervene, the purpose of this Court's Rule 29(4)(c) has been fulfilled. At any rate, petitioner has now served the California AG with the petition and this brief.

which it claims its interests may be vindicated elsewhere.

In all events, there is hardly a "significant risk," Opp.12, that the *FOMB* litigation will result in a finding of dedication. The trial court held a bench trial and entered final judgment confirming that petitioner owns Martins Beach in fee simple absolute. Pet.9-10. The court of appeal's previous ruling that the plaintiffs had *alleged* a dedication claim does not remotely suggest that it is likely to reverse a verdict grounded in factual findings following a full-blown trial. And critically, if certiorari is denied now, petitioner may not have another opportunity to present these questions to this Court after *FOMB* is affirmed on appeal.

D. Surfrider's suggestion that the State might condemn an easement over Martins Beach is fanciful and beside the point. The statute to which Surfrider refers was primarily a public-relations stunt; it is more than three-and-a-half years old and has produced exactly zero progress toward a negotiated resolution or condemnation proceeding. *See* Pet.App.8 n.6. Moreover, *every* takings case could be mooted if the government ceases its conduct or agrees to pay compensation. If that were enough to make a case uncertworthy, this Court would never hear takings cases. And in all events, the statute only confirms that the state itself recognizes that the property is private; otherwise, there would be no need to condemn an easement.

* * *

Surfrider poses a hypothetical in which petitioner bought the property subject to a tenant's rights and

asserts that the Takings Clause would not prevent a court from enjoining eviction proceedings "until the claims had been sorted out." Opp.24. To the extent Surfrider is referring to a *preliminary* injunction, the hypothetical is irrelevant, as the court entered a permanent injunction here. To the extent Surfrider is referring to a *permanent* injunction, it is simply wrong—a court *could not* permanently enjoin the eviction unless and until the tenant established a right to remain on the property. That is precisely why there is a taking here: "Surfrider point[ed] to nothing showing the public has a right to access Martins Beach," Pet.App.35, and yet the California courts have enjoined petitioner from shutting down its unprofitable business and excluding the public. That result cannot be reconciled with the Takings Clause.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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