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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITIONERS

BRIAN T. HODGES
Counsel of Record
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
E-mail: bth@pacificlegal.org
Counsel for Amici Curiae Pacific Legal Foundation and Western Manufactured Housing Communities Association (WMA)

QUESTIONS PRESENTED

1. Whether a compulsory public-access easement of indefinite duration is a *per se* physical taking.

2. Whether applying the California Coastal Act to require the owner of private beachfront property to apply for a permit before excluding the public from its private property; closing or changing the hours, prices, or days of operation of a private business on its private property; or even declining to advertise public access to its private property, violates the Takings Clause, the Due Process Clause, and/or the First Amendment.

Table of Contents

Table of Authorities

Page

Cases

Other Authorities

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation and Western Manufactured Housing Communities Association (WMA) submit this brief amicus curiae in support of Petitioners Martins Beach 1, LLC, and Martins Beach 2, LLC.[1]

Pacific Legal Foundation (PLF) was founded 45 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys participated as lead counsel in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012), *Palazzolo v. Rhode Islan*d, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and participated as amicus curiae in numerous takings cases before this Court, including *Arkansas Game & Fish*, 568 U.S. 23 (2012), *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528

[1] All parties were notified and have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

(2005), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective will aid this Court in considering Martins Beach's petition.

The WMA is a statewide trade association representing the owners of 1,700 manufactured/mobilehome communities, which contain approximately 180,000 homes, distributed throughout California. In total there are 4,600 manufactured/mobilehome communities representing 393,000 homes in California. WMA was founded in 1945 and is the largest and oldest trade association representing community owners in California and in the United States. WMA is a 501(c)(3) mutual benefit nonprofit corporation whose mission is to preserve and promote the interests of manufactured and mobilehome community owners, operators, and developers. WMA's activities include educational programs and legislative and judicial advocacy. WMA's members are interested in this case because it concerns an important issue that affects their industry, the preservation of property rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Martins Beach's petition for a writ of certiorari raises an important and unresolved question concerning the protections provided by the Takings Clause of the Fifth Amendment of the U.S. Constitution. Specifically, the petition asks the Court to resolve the longstanding confusion regarding the terms "temporary" and "permanent" when used to

describe a physical taking of limited duration. Clarifying these terms is a matter of utmost importance to property owners across the nation because the lower courts, like the California court below, often use the term "temporary" to shield a government intrusion upon private property from meaningful scrutiny, depriving those owners of their right to just compensation.

This case arises from a California trial court's issuance of an injunction authorizing the public to cross over Martins Beach's property to access and recreate on the beach. Martins Beach sought to invalidate the injunction on appeal, arguing that the injunction effected a per se physical taking of its property under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Pet. App. at 39-42. The California court of appeal, however, refused to enforce that categorical rule because the injunction was "temporary" in duration (due to the fact that the government may modify its decision in the future). Pet. App. at 42-51. The court then concluded that a landowner alleging a "temporary" physical taking must adjudicate his or her claim under an undisclosed multifactorial test—not the categorical test set out in *Loretto*. Pet. App. at 39 (suggesting without deciding that temporary physical takings plaintiffs may be required to satisfy the ad hoc regulatory taking test announced in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978)). Then, instead of identifying the appropriate test, the court simply dismissed Martins Beach's taking claim because it made "no attempt to show the injunction effected a taking under *Penn Central* test (or any other multifactor test)". Pet. App. at 39, 56-60.

The California courts' sole focus on the duration of the physical invasion as determining the applicable takings test is not supported by this Court's takings precedents. Over the years, this Court has used the terms "permanent" and "temporary" to describe a compensable government interference with property with little regard to the actual duration of the intrusion.[2] For example, the "temporary" land use moratoria at issue in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-23 (2002), lasted six years; whereas, the regulation resulting in a "permanent" deprivation of all economically viable land uses in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), was only in effect for two years.[3] And this Court's seminal physical taking case, *Loretto v. Teleprompter Manhattan CATV Corp.*, used the term "permanent" to describe a physical occupation—*i.e.*, installation of a cable box—where the statute at issue required landlords to permit cable companies to install facilities on their properties for "[s]o long as the property remain[ed] residential and a [cable] company wishe[d] to retain the installation." 458 U.S. at 439.

---

[2] *See, e.g.*, Professor Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. Tol. L. Rev. 281, 293 (1993) ("While the Court has distinguished between 'temporary physical invasions' and 'permanent physical occupations,' after [*First English*], even temporary physical invasions may be per se takings, requiring just compensation for the time the property is occupied.").

[3] *See* Steven J. Eagle, *Some Permanent Problems with the Supreme Court's Temporary Takings Jurisprudence*, 25 U. Haw. L. Rev. 325, 340 (2003).

A close reading of this Court's takings case law confirms that the terms "temporary" and "permanent" properly refer to the lasting effect that the government intrusion has on the owner's rights, not the duration of the government's activities. Thus, in *United States v. General Motors Corp.*, the Court held that government's one-year occupation of an automotive parts plant during World War II took an easement for a term of years for which just compensation was required. 323 U.S. 373, 378 (1945). The effect of the temporary occupation was "permanent" because, although the plant was returned, the owner's rights in the property were irreparably harmed. *Id.*

The California court's decision is particularly objectionable—and particularly appropriate for review—because it rejects the test that this Court developed for physical takings based solely on the duration of the injunction, and without any analysis regarding the impact that the public access easement has on Martins Beach's rights. Furthermore, if left unreviewed, the state court decision will turn constitutional litigation into a game of blindman's bluff, where property owners will have to guess as to what test is applicable to their claim, risking dismissal for not satisfying any of the undisclosed factors. As such, the decision below provides a roadmap for government to circumvent the scrutiny required by this Court by simply stating that a physical invasion or occupation is temporary and/or subject to modification.

ARGUMENT

I

THE CALIFORNIA COURT'S FOCUS ON THE DURATION OF GOVERNMENT ACTION TO DETERMINE WHETHER A PHYSICAL INVASION IF "TEMPORARY" OR "PERMANENT" CONFLICTS WITH DECISIONS OF THIS COURT

The reason why the California court's decision creates so many conflicts with this Court's takings case law is because the lower court focused on the wrong question to determine whether the injunction authorizing the public to cross over Martins Beach's land should be characterized as a "temporary" or "permanent" taking. This Court has long held that it is the character of the government action—*i.e.*, whether it directly interferes with the owner's rights in his or her property—that determines whether a physical invasion is "permanent" or not. *See*, *e.g.*, *United States v. Cress*, 243 U.S. 316 (1917). The California court, however, focused solely on the duration of the public access order to characterize the physical invasion as "temporary." Pet. App. 39, 42-51. That conclusion markedly departs from this Court's physical takings case law and warrants review.

A. Physical Invasions Are Subject to the Same Test Regardless of Their Duration

This Court's decision in *Arkansas Game & Fish Commission v. United States* confirmed that a temporary physical taking will occur when government action gives rise "to 'a direct and immediate interference with the enjoyment and use of

the land.'" 568 U.S. at 33 (quoting *United States v. Causby*, 328 U.S. 256, 266 (1946)). The decision also reaffirmed the rule that when "the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.* at 31 (quoting *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 322).

Those two principles arise from a long line of case law dating back to the Court's first physical invasion case, *Pumpelly v. Green Bay Co.*, in which this Court held that the government must compensate a property owner when it uses private property in a manner that inflicts "irreparable and permanent injury to any extent." 80 U.S. (13 Wall.) 166, 177-78 (1871). Several decades later, in *United States v. Lynah*, 188 U.S. 445, 468 (1903), the Court explained why some physical invasions will rise to the level of a compensable taking while others will not. There, distinguishing between direct and consequential injuries, the Court held that the government will be held liable for a taking when it causes a physical invasion or occupation of private property that results in a "serious interruption to the common and necessary use of property" or is "so as to substantially destroy" the land's value and effect a "practical ouster" of that land. *Id.* at 470, 472.

The first time a majority of the Court spoke directly to the effect of a temporary invasion was in *United States v. Welch*, 217 U.S. 333 (1910). There, a dam on the Kentucky River permanently flooded a strip of land adjacent to Welch's farm, depriving him of the only practical way to access the county road from his property. *Id.* at 338. The government argued that the interference with access was collateral and

consequential—at most a tort. *Id*. The Court rejected the government's argument, holding that the flooding, even though it occurred on land adjacent to Welch's farm, had a direct impact on Welch's right to access his land. *Id*. at 339. The government flooding effectively appropriated Welch's interest in his right of way. *Id*. Important to the discussion of temporary takings, the Court explained that, even if the government had caused flood waters to enter and destroy private property, then stopped the flooding, its actions would still amount to a taking: "But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would an appropriation for the same end." *Id*.

Several years later, in *United States v. Cress*, the Court directly addressed physical invasions of a limited duration when it concluded that government-induced flooding does not have to be a continuous condition on the land to rise to the level of a taking. 243 U.S. 316, 327-28 (1917). In *Cress*, the federal government's construction and operation of locks and dams on the Kentucky and Cumberland Rivers caused the rivers and their tributaries to back up and intermittently overflow a portion of one plaintiff's property and interfere with another plaintiff's operation of a mill. *Id*. at 318-19, 327. The Court found that the periodic intrusions appropriated an easement because, during periods of overflow, the government's actions directly and substantially interfered with each landowner's rights to make valuable use of his property. *Id*. at 329-30. The Court concluded that, although intermittent, the flooding directly interfered with the landowner's rights to possess, use, exclude others, and/or dispose of his or her property. *Id*. at

328, 330. *Cress*, therefore, rejected the argument that the duration of the government action is determinative of whether a taking has occurred, holding that there is "no difference in kind . . . between a permanent condition of continual overflow by back-water and permanent liability to intermittent but inevitably recurring overflows." *Id*. at 328.

Importantly, *Cress* recognized that the only distinction between permanent and intermittent flooding was that, in the latter circumstance, the landowner may retain possession of his land and the government is obligated to compensate the owner for the value of the easement taken. *Id*. at 328-29 ("If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial, instead of a total, devesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain."). Thus, *Cress* established the modern test for physical takings: "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question of whether it is a taking." *Id*. at 328.

The Court applied this rule across a series of cases involving the government's temporary seizure of private property during World War II. In *United States v. Pewee Coal Co.*, for example, the Court held that the federal government was obligated to pay just compensation after it had "possessed and operated" the property of a coal mining company for 5½ months in order to fend off a nationwide miners' strike in the middle of the war. 341 U.S. 114, 115 (1951). The Court unanimously agreed that the government's seizure was a taking, with no regard to the occupation's

limited duration. *Id.* (plurality); *id.* at 119 (Reed, J., concurring); *id.* at 121-22 (Burton, J., dissenting). References to the "temporary" nature of the government's possession were made in the context only of the amount of compensation due to the property owner. *See*, *e.g.*, *id.* at 117 (plurality). Other wartime seizure cases confirm the principle that short-term occupations can effect a categorical taking. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 3-4, 7, 16 (1949) (government commandeered laundry plant for less than four years, was required to pay rental value for occupied period of time plus depreciation and value of lost trade routes); *United States v. Petty Motor Co.*, 327 U.S. 372, 374 (1946) (government compensated leaseholders for the temporary taking of their leaseholds for period of over two-and-a-half years); *General Motors*, 323 U.S. at 375 (government required to pay short-term rental value for taking portion of a building that had been leased by an automobile parts company); *International Paper Co. v. United States*, 282 U.S. 399, 407-08 (1931) (government order authorizing a third party to draw the whole of a river's water flow for a period of 10 months effected a physical taking of a paper mill's water rights requiring the payment of just compensation).

Critically, in *United States v. Dickinson*, the Court explained why a physical invasion of limited duration constitutes a "permanent" taking. 331 U.S. 745, 750 (1947). In that case, the Court found that government-induced flooding, which lasted for approximately five years, constituted a taking even though most of the affected land had been reclaimed prior to the takings claim being filed. *Id.* at 750-51. The Court concluded

that, by subjecting the property to flooding, the government had exercised dominion over the land and, therefore, had taken an easement. *Id*. at 750. The Court explained that, for the period of time the land was under water, "no use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and an obligation to pay for it then arose." *Id*. at 751.

Causby is perhaps the most significant decision from this period because the Court was directly confronted with the question of what test applies to a temporary invasion of private property. There, the Court was asked to determine whether a taking was effected when the U.S. Navy authorized, for a temporary and determinable period of time, low altitude overflights that prevented use of Causby's property as a commercial chicken farm. 328 U.S. at 258-62. On these facts, the Court held that "the land is appropriated as directly and completely as if it were used for the runways themselves." *Id*. at 262.

In regard to the duration of the Navy's operations, the Court, once again, explained that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Id*. at 266. The Court found that a taking had occurred because "the damages were not merely consequential. They were the product of a direct invasion of respondent's domain." *Id*. at 265. The government's "intrusion was so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id*. at 265. Thus, the harm to the property owner was permanent.

This longstanding formulation of the physical takings doctrine is the precise expression of the per se rule that the Court adopted in *Loretto*, 458 U.S. at 426 (When the government physically occupies private property, "'the character of the government action' not only is an important factor in resolving whether the action works a taking, but also is determinative."). This same formulation was reaffirmed in *Arkansas Game & Fish*, 568 U.S. at 39 (citing *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003)). The California court's focus on the duration of the public access order as being determinative of Martins Beach's takings claim—rather than the character of the invasion—directly conflicts with this Court's case law and warrants review.

B. Review Is Additionally Necessary To Address Widespread Confusion Concerning *Loretto*'s Discussion of Temporary Physical Takings

Much of the confusion in the California court's decision is attributable to a single footnote to *Loretto*, in which the Court stated that it had subjected "temporary" takings physical cases to "a more complex balancing test."[4] Pet App. at 42 (quoting *Loretto*, 458 U.S. at 435 n.12). The California court read this

[4] The meaning of this footnote has perplexed other courts and legal scholars for decades. *See*, *e.g.*, Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 Ind. L. J. 1185, 1194 (1997) ("This single judicial pronouncement is a principal source of the current uncertainty in the temporary physical takings jurisprudence."); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 362-63 (2007).

footnote as requiring that any claim alleging a physical invasion of a limited duration be adjudicated under a multifactorial test, like the ad hoc test developed in *Penn Central Transp. Co. v. New York City*, 438 U.S. at 123-24. Pet. App. at 42, 56-60. The lower court's confusion in this regard is readily refuted, once again, by a close reading *Loretto*.

In *Loretto*, a New York statute required landlords to permit cable companies to install facilities on their properties "[s]o long as the property remain[ed] residential and a [cable] company wishe[d] to retain the installation." 458 U.S. at 439. Despite the indefinite duration of the occupation, the question presented asked "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." *Id*. at 421.

The underlying state court decision mirrored the California decision below. The New York court refused to analyze Loretto's claim under the physical takings test set forth by *Causby*, applying instead the *Penn Central*'s multifactor regulatory takings test. *Id*. at 425-26; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 423 N.E.2d 320, 330 (N.Y. 1981). The threshold issue before this Court, therefore, was whether *Penn Central* had supplanted the physical takings test. *Id*. at 425-26. And on that question, the Court held that *Penn Central* did not change the test

for physical takings (*id.* at 426, 432)—a ruling the Court reaffirmed in *Tahoe Sierra.*[5]

While *Loretto* was not called upon to distinguish a "temporary" from a "permanent" physical taking, the Court observed that a when a regulatory action "reaches the extreme form of a permanent physical occupation," the character of the government's action becomes the determinative factor, giving rise to a compensable taking without regard to any other considerations applicable to regulatory claims. *Id.* Then, in a footnote, the Court stated:

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking. [S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

Id. at 436 n.12.

The California court read the footnote to refer to the duration of the government action, not its permanent impact. That reading, however, renders *Loretto* both internally and externally inconsistent.

---

[5] *See* 535 U.S. at 323 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking' and vice versa.").

Indeed, if those terms refer solely to duration, then *Loretto* must be interpreted to have overruled *sub silentio* all of the cases discussed above, including *Pewee Coal*. Yet *Loretto* unqualifiedly relied on *Pewee Coal*. *See Loretto*, 458 U.S. at 431. Clarification of this critical point of law is essential.

Indeed, given the fact that this Court has repeatedly held physical takings of limited duration subject to the test for permanent physical takings, it is surprising that only one court has carefully and comprehensively addressed this issue—*Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). To combat ground water pollution, the federal government in *Hendler* requested access to plaintiffs' property to install wells for monitoring and extracting waste migrating from a nearby site. Disregarding the landowner's objections, government agents entered the property and installed the wells. *Id*. at 1367. The property owner challenged the government's actions as effecting a taking. The Court of Federal Claims ruled in the government's favor, but the Federal Circuit reversed. *Id*. at 1368. Consistent with the wartime seizure cases, the Federal Circuit held that the installation of wells on plaintiffs' property constituted a physical occupation, and thus a per se taking—regardless of the finite or even short-term duration of the occupation. *Id*. at 1378. Addressing the government's claim that the occupation was temporary (and thus subject to a multifactor balancing test), the Federal Circuit offered a different interpretation of the term "temporary:"

> "[P]ermanent" does not mean forever. A taking can be for a limited term—what is "taken" is an estate for years, that is, a term

> of finite duration as distinct from the infinite term of an estate in fee simple absolute.
>
> . . . .
>
> If the term temporary has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass.[6]

Id. at 1376-77.

Many legal scholars have reached the same conclusion as *Hendler*, noting this Court's consistent use of the terms "temporary" and "permanent" to indicate the character of the government's intrusion upon an individual's property rights:

> [P]ermanency for doctrinal purposes is not synonymous with permanency in a temporal sense. Rather, it is a label attached to property interference of a sufficiently severe nature. Thus, in developing its [physical] takings doctrine, the Supreme Court has focused on the quality, not the duration of invasion. This was true in early cases and more recent cases. The Court has even viewed interference with limited term leaseholds as a compensable taking. Occasional, periodic, or intermittent

---

[6] Other courts adhere to the view that all temporary physical takings be reviewed under *Penn Central*. *See Juliano v. Montgomery-Ostego-Schoharie Solid Waste Management Authority*, 983 F. Supp. 319, 327 (N.D.N.Y. 1997) (accusing *Hendler* of "completely emasculat[ing]" takings law).

> occupations can also fall within the rule. In contrast, an isolated, or technical trespass has been viewed as a temporary invasion. Indeed, the Court's latest land use decisions reject any literal distinction between temporary and permanent interferences as determinative in either regulatory or [physical] takings cases. . . . *'Permanency' is thus a legal conclusion, rather than an evidentiary fact.*

Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 994-96 (1989) (emphasis added). Similarly, Steven Blevit noted:

> It almost goes without saying that 'when the Court speaks in terms of permanent physical occupation, it does not necessarily mean that the occupation is one that will last forever.' . . . The term "permanent" is really the Court's shorthand way of describing which physical occupations, because of the character of the occupation, have a sufficiently severe effect on the property owner such that no public interest can outweigh the impact on the property owner. Thus, no further inquiry into the purpose of the governmental action is necessary. The temporal character of the invasion is a relevant consideration, but not controlling.

Steven Blevit, Note, *A Tale of Two Amendments: Property Rights and Takings in the Context of Environmental Surveillance*, 68 S. Cal. L. Rev. 885, 905-06 (1995) (quoting *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1544 (11th Cir. 1985), *rev'd on other grounds*, 480 U.S. 245 (1987)). This understanding of

the terms "temporary" and "permanent" is consistent with this Court's physical takings cases.

The conclusion that the term "permanent" refers to the nature of the injury caused by an intrusion is consistent with the purpose of the Takings Clause, which is to guarantee compensation when the government appropriates an interest in property. Thus, this Court has relied on the permanence of harm inquiry to distinguish a constitutional claim from a claim properly characterized as a tort since its earliest physical takings cases, *Pumpelly* and *Lynah*. *Loretto* confirmed this point by contrasting a "permanent physical occupation" from those "temporary and shifting" conditions that are akin to an "ordinary traveller [sic], whether on foot or in a vehicle, pass[ing] to and fro along the streets. . . . The space he occupies one moment he abandons the next to be occupied by another traveler," as opposed to an invasion that becomes a fixed and stable condition of the property such that it dispossesses the owner of his or her rights. *Id.* at 428-29 (quoting *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1893)). Only clarification by this Court will dispel the widespread and deeply entrenched confusion caused by *Loretto*'s footnote.

C. *Arkansas Game & Fish* Did Not Change the Test Applicable to Physical Invasion Cases

The California court also refused to analyze Martins Beach's claim under this Court's test for physical takings based on its misreading of two passages from *Arkansas Game & Fish*. Pet. App. 37-38. Those passages include, first, this Court's observation that, while permanent physical invasions

are subject to categorical treatment, "most takings claims turn on situation-specific factual inquiries" (Pet. App. 37-38 (quoting *Arkansas Game & Fish*, 568 U.S. at 31-32)), and second, this Court's overview of various regulatory and physical takings inquiries in which the duration of a government act can be relevant (but notably not determinative) to a takings claim.[7] *Arkansas Game & Fish*, 568 U.S. at 39.

If read in isolation, those passages can be confusing. But, as *Arkansas Game & Fish* admonished, a single passage cannot be read out of context to create a rule that the Court did not intend: "the first rule of case law . . . interpretation is: Read on." *Id.* at 36. And when *Arkansas Game & Fish* is read in its entirety it is readily apparent that the Court did not intend to modify any of the established takings tests. Indeed, the Court expressly limited its decision to one narrow question, "We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id.* at 38.

Thus, when speaking to the takings tests applicable in various circumstances, *Arkansas Game & Fish* stated that it remains "incumbent on courts to

---

[7] For example, the Court recites the "intent or foreseeability" test that is applied as a threshold inquiry to distinguish physical takings from torts like negligence and trespass. *Ridge Line Inc.*, 346 F.3d at 1355-56. The Court also references the "reasonable investment backed expectations" test developed specifically for ad hoc regulatory takings in *Penn Central*, 438 U.S. at 124. The Court next refers to the "severity of the interference" inquiry, which requires substantially different analyses in the physical and regulatory contexts. *Compare Penn Central*, 438 U.S. at 130-31, with *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 329-30 (1922).

weigh carefully the relevant factors and circumstances in each case, *as instructed by our decisions*." *Id*. at 36 (emphasis added). And critically, *Arkansas Game & Fish*, at 31, relied on *Tahoe-Sierra*, in which this Court had recognized that physical takings and regulatory takings are distinct and separate legal concepts. *Tahoe-Sierra*, 535 U.S. at 321-23.

The California court's interpretation of *Arkansas Game & Fish* would radically change federal takings law—which this Court did not intend—and would and create conflicts within this Court's case law.

II

THERE IS NO BASIS FOR THE CALIFORNIA COURT'S DECISION TO SUBJECT A PHYSICAL INVASION OF LIMITED DURATION TO A DIFFERENT TEST THAN THAT APPLICABLE TO AN INVASION OF A LONGER DURATION

Review is additionally warranted because the lower court's decision to make the duration of a physical invasion the sole determinative factor when deciding whether the invasion will be subject to this Court's longstanding test for physical takings undermines the purpose of the Takings Clause, which bars uncompensated takings without qualification. U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also Cress*, 243 U.S. at 328.

This Court's consistent treatment of physical takings is largely due to the appropriative nature of a physical invasion or occupation of private property.

General Motors, 323 U.S. at 378.; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. at 539 (A physical invasion will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using his or her property, which is "perhaps the most fundamental of all property interests."); *Loretto*, 458 U.S. at 435 (When the government invades private property, "[t]he government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."). Thus, to the extent the government physically invades or occupies one's land, it destroys the owner's essential rights thereto and its actions constitute a taking. *Loretto*, 458 U.S. at 426, 435; *see also Arkansas Game & Fish*, 568 U.S. at 33 ("Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'") (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987)). And, insofar as it relates to the character of the government action, questions regarding the duration of the government invasion are only meaningful to the resolution of a takings case if the duration was so fleeting or temporary that it did not interfere with the owner's property rights—a distinction that the lower court failed to acknowledge. *See Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922).

Thus, when the terms "temporary" and "permanent" are employed without regard to the actual injury suffered by the property owner (as was

the case below), the designation may be little more than a semantic marker, signifying whether the court believes compensation is warranted on a case-by-case basis. *See*, *e.g.*, Robert Meltz, Dwight H. Merriam, & Richard M. Frank, *The Takings Issue* 124-25 (1999). Allowing the terms to be used in that manner, however, is sanctioning a standardless and arbitrary approach to the protection of fundamental rights. The Takings Clause, however, is intended "to preserve practical and substantial rights" that individuals have in their property. *Dickinson*, 331 U.S. at 748-49. That purpose is not served when the lower courts develop procedures designed to dispose of otherwise meritorious takings claims, such as the lower court's decision to subject blatant physical invasions to a multifactor test so ill-suited to the circumstances that it guarantees failure of every claim.[8] *Id*. Review is

---

[8] Balancing tests have proven entirely unworkable under this Court's regulatory takings doctrine, and for that reason should be avoided where clear standards are available. *See* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Making Sense of Penn Central*, 38 Ecology L.Q. 731, 735 (2011) (observing that the *Penn Central* balancing test remains shrouded in a "formless, directionless haze," and noting the constant calls for further guidance from courts and commentators). Indeed, in the 32 years since *Penn Central* relegated (most) regulatory takings claims to its multifactor balancing test, that area of takings jurisprudence has become a veritable jungle of contradictory opinions. *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 175 (2005) (arguing that the *Penn Central* balancing test serves as nothing more than "legal decoration for judicial rulings based on intuition"). *Penn Central* and its progeny have remained rudderless and commentators invariably agree that neither property owners nor government regulators have any way of rationally assessing takings liabilities under that regime. *See* Eagle, *supra*, at 352 ("[E]mphasis on balancing tests gives . . . no one much predictability.").

necessary to ensure that the guarantees of the Takings Clause are given real and meaningful effect.

CONCLUSION

For the foregoing reasons, Amici urge this Court to grant the petition for a writ of certiorari.

DATED: March, 2018.

Respectfully submitted,

BRIAN T. HODGES
Counsel of Record
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
E-mail: bth@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation and Western Manufactured Housing Communities Association (WMA)