No. 23-1103

IN THE
Supreme Court of the United States

SAWTOOTH MOUNTAIN RANCH, LLC,
LYNN ARNONE, AND DAVID BOREN,

PETITIONERS,

V.

UNITED STATES FOREST SERVICE, ET AL.,

RESPONDENT.

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

Amicus Curiae Brief of Desmond, Nolan, Livaich & Cunningham Supporting Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTEREST OF THE AMICUS CURIAE

Desmond, Nolan, Livaich & Cunningham is a California law firm that has represented and advocated on behalf of property owners and specialized in eminent domain and inverse condemnation law since 1938.[1] Our firm is recognized as a preeminent leader in condemnation law in California, and our firm and attorneys have received numerous awards in the field, been consulted on and participated in the revision of California civil jury instructions and statutory drafting, and testified in front of the California state legislature regarding private property rights. More than a dozen of our cases have been the subject of reported opinions issued by the California Supreme Court and California Court of Appeal. Although our practice has historically focused most heavily on state condemnation law, we also represent clients before the federal courts. We offer the perspective of counsel for property owners who face difficult decisions about whether and how to pursue redress of their property rights in the Ninth Circuit and have an interest in promoting clarity that allows us to provide the most effective guidance possible to our clients.

INTRODUCTION

Litigation of takings and other real property-related claims is not for the faint of heart. Traps for

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[1] No counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission. The parties were timely notified.

the unwary seem to abound, particularly in the lower courts of the Ninth Circuit. When this Court can clarify the law in a manner that takes guesswork and undue risk out of the equation for litigants with colorable claims, it should. Suing the government is already a daunting process for many landowners. Making the process of adjudicating a claim less of a gotcha game with the courts over matters that concern judicial efficiency rather than the merits of a case should be of paramount concern to this Court, and this is a case in which the Court can and should grant certiorari to further that objective.

ARGUMENT

I
THE COURT SHOULD RESOLVE UNCERTAINTY CONCERNING THE AVAILABILITY OF EQUITABLE TOLLING.

The Ninth Circuit's holding that equitable tolling is unavailable for claims subject to the statute of limitation set forth in 28 U.S.C. §2409a(g) diminishes the scope and impact of this Court's emphasis on common sense over rigidity and rejection of formality over equity, and it ignores the analysis supporting this Court's recent holding in *Wilkins v. United States*, 598 U.S. 152 (2023).

As this Court has previously explained, "Equitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods." *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 208–09 (2022). Further, the Court has held

that "mundane statute-of-limitations language" "does not . . . in any way cabin [a court's] usual equitable powers." *United States v. Wong*, 575 U.S. 402, 411 (2015). In *Wilkins*, the Court held that the Quiet Title Act's 12-year time limit for bringing a claim against the United States is a nonjurisdictional claims-processing rule. In its analysis in support of the holding, the Court characterized the statute of limitations as one encompassing "'mundane statute-of-limitations language.'" 598 U.S. at 158. The implication of the Court's holding in *Wilkins* is, therefore, that equitable tolling should be available when §2409a(g) applies.

The Ninth Circuit, however, has concluded otherwise, citing this Court's conclusion in *United States v. Beggerly*, 524 U.S. 38, 48 (1998) that "equitable tolling would be unwarranted" in cases subject to the statute of limitations set forth in §2409a(g) because of the length of the period of limitations, text of the statute, and concern for avoiding uncertainty as to the rights of landowners. But the analysis of *Beggerly* is now inconsistent with the Court's determination in *Wilkins* that the statute of limitations is not jurisdictional and that its text does not warrant exceptional treatment. And the uncertainty the Court spoke of avoiding in *Beggerly* is now being caused rather than alleviated by the holding of that case.

The Court's holding in *Wilkins* would be of little consequence to anyone if the Ninth Circuit's conclusion were correct. In this case, the government did not even raise the statute of limitation as a defense. The District Court raised the issue *sua*

sponte. *Sawtooth Mountain Ranch, LLC v. United States Forest Service* (9th Cir., Nov. 16, 2023, No. 22-35324) 2023 WL 7876347, at *1. Thereafter, the Ninth Circuit enthusiastically capitalized on the opportunity to review the issue *de novo*, despite the fact that this required it to engage in fact-finding that would have more appropriately been handled on remand to the District Court and its acknowledgment that, in light of the holding in *Wilkins*, the statute of limitations must be enforced only "when properly raised as an affirmative defense." *Id.* The result? The lower courts manufactured an issue not in dispute, to serve the interests of the courts rather than the litigants, rendering *Wilkins* practically irrelevant.

One is left to wonder what chance landowners in the Ninth Circuit have of successfully vindicating property rights when the courts eschew their own equitable powers and prove to be more formidable opponents than the government.

The Ninth Circuit seems clearly to have misconstrued how *Beggerly* should be understood after this Court's decision in *Wilkins*. This Court should not allow the Ninth Circuit to disregard *Wilkins* or perpetuate a misunderstanding of its import. The Court should clarify that equitable tolling applies, and how, so that landowners can confidently evaluate whether their claims will be deemed timely or not and make better informed decisions about whether to file suit to obtain redress for wrongful conduct of the government concerning their real property.

II
THE COURT SHOULD CLARIFY THAT A PROPERTY OWNER NEED NOT SEEK MONETARY DAMAGES TO MAINTAIN A REGULATORY TAKINGS CLAIM.

The Court should also take the opportunity to stop seeds of confusion from growing out of the Ninth Circuit's concerning and unfounded suggestion that a takings claim cannot be maintained because monetary damages have not been sought by a landowner.

Had the Ninth Circuit remanded to allow the District Court to reevaluate the statute of limitation issue with the correct understanding that it is not jurisdictional, the Petitioners would have had opportunity to pursue their takings theory. Instead, the Ninth Circuit deemed the issue "forfeited and unripe." This harsh result would have been bad enough, but rather than stop at that basis for disposition of the argument, the Court then proceeded to suggest this was inconsequential because the Petitioners' action sought "only declaratory and injunctive, no monetary, relief," and the government might choose to "retain its interest in the trail easement upon payment of compensation, as opposed to relinquishing its challenged interest altogether." *Sawtooth Mountain Ranch, LLC* at *2.

In so rationalizing, the Ninth Circuit implied that a property owner must seek a damages remedy to maintain a takings claim because of the possibility that the government will choose to pay for its taking rather than cease conduct deemed

violative of the Fifth Amendment's Takings Clause. This is not consistent with the law developed by this Court. See, e.g., *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (regulation invalid under the Fifth Amendment and struck down); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (conditions violated the takings clause and were invalidated); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (conditions invalidated); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (legislation challenged; declaratory relief and injunction sought).

While just compensation is a constitutional remedy for the taking of property, the Court has made it clear that it is not the only remedy available to property owners. Declaratory and injunctive relief are remedies a landowner may pursue, whether in addition to or instead of compensation. A landowner's lack of desire to pursue damages should not prejudice their position or threaten to lead to the disposal of what may be a meritorious case. Not all takings result in easily quantifiable damages. Some landowners subject to takings are not in the position to or do not desire to expend significant resources to prove a claim for damages. Some landowners simply want unlawful conduct or intrusions of the government to stop. Some want to be permitted to make uses of their property they have been denied. Should such landowners be compelled to seek a monetary remedy from the government? Should they pray for damages they have no desire to prove to avoid the fate of the Petitioner in this case?

If the government is able and ultimately elects to pay to cement the permanency of a taking established through litigation, then a landowner

may not be able to secure their preferred remedy. But that possibility should not preclude their right to seek the remedy in the first place. The Court should not allow confusion to germinate on this point. It should review and address the matter now in conjunction with its clarification of the equitable tolling issue.

CONCLUSION

The petition for certiorari should be granted.

Respectfully Submitted,

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