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- [Rankings](#)
- [Regional Powerhouses](#)
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- [Glass Ceiling Report](#)
- [Global 20](#)
- [Law360 400](#)
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- [Practice Group Partner Rankings](#)
- [Practice Groups of the Year](#)
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High Court Could Clarify Takings Law In Beachfront Dispute

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Law360 (March 1, 2018, 3:26 PM EST) -- A California billionaire has asked the [U.S. Supreme Court](#) to hear a case concerning access to his beachfront property, and while the dispute is riddled with state-specific issues, experts say the high court could step in to offer clarity on whether the state has unconstitutionally taken value from the property by saying the owner can't restrict public access.

[Sun Microsystems Inc.](#) co-founder Vinod Khosla a decade ago bought beachfront property south of San Francisco and subsequently closed off public access to the beach, and lower and appellate court rulings in **2014** and **2017**, respectively, found Khosla had violated the California Coastal Act by closing off public access.

Now, on the heels of the California Supreme Court's recent decision not to hear the case, *Surfrider Foundation v. Martins Beach 1 LLC et al.*, Khosla has petitioned the U.S. Supreme Court to weigh in, and experts say the nation's high court would have a more narrow set of issues than the California Supreme Court, since part of the case deals with state law.

Still, the nation's high court could offer an opinion on whether Khosla has experienced an

unconstitutional regulatory taking, and such an opinion would provide more clarity for coastal states that try to walk a fine line between private property rights versus rights to access for the public, experts say.

"California takes a very protective stance with respect to the public's enjoyment of the environment," said Diane De Felice of [Brownstein Hyatt Farber Schreck LLP](#). "Here, what the [U.S. Supreme] Court is really going to look at is the scope of the Coastal Act's [possible] infringements on private property rights and whether or not [requiring public access] constitutes a taking."

The case has several prongs. On the one hand, two courts in California have found that Khosla was not in compliance with state law since he had blocked access to the beach without first obtaining a permit from the [California Coastal Commission](#).

But in petitioning to the nation's high court, Khosla argued the state's interference in his attempt to keep the public off the beaches of his coastal property constituted a taking.

"It's going to be a very narrow, limited review" if the high court takes it, said Bryan LeRoy of [Nixon Peabody LLP](#). "Whether or not the trial court injunction is a per se taking, that is where there is a federal question. ... There are so many different layers."

The high court, for example, would likely not be concerned with whether restricting beach access requires a coastal development permit. And since that question was a key component of the dispute in the state courts, taking that issue off the table may pose challenges to getting the case heard by the U.S. Supreme Court at all, lawyers say.

Further complicating matters for the petitioners, experts say, is the fact the owner has not sought a permit, which also creates procedural challenges, lawyers say. The courts in California have said the case is not ripe since the owner hasn't applied for a permit, and that creates "some procedural issues" for getting the case to the U.S. Supreme Court, according to Bryan Wenter of [Miller Starr Regalia](#).

"The Supreme Court of the United States does not like to hear state issues unless the state Supreme Court has ruled on it and there is a federal implication," said Benjamin Reznik of [Jeffer Mangels Butler & Mitchell LLP](#).

Surfrider Foundation, a California-based nonprofit that's in part focused on preserving access to beaches, has spearheaded the fight to keep the beach open.

"The petition represents a challenge to the decades of work by California's coastal communities to ensure public access to the coast," Eric Buescher of [Cotchett Pitre & McCarthy LLP](#), counsel for Surfrider Foundation, told Law360. "Petitioners ask the Supreme Court to bless their refusal to comply with the Coastal Act by cloaking their desire to exclude the public in the language of constitutional rights."

Experts say if the high court agrees to hear the case, the court's opinion will be closely watched by states like California and Florida that have hundreds of miles of coastline and often see such property disputes play out in state courts.

Wenter said it is possible the high court will take up the case due in part to its 5-4 conservative makeup, since the case involves the issue of property rights over public access.

"We'll be looking at the court's decision. Obviously, Florida will modify our own statute as needed," said Katie Edwards-Walpole, who is counsel at [Saul Ewing Arnstein & Lehr LLP](#) and also a member of the [Florida House of Representatives](#). "In Florida, we value private property rights ... [and] we feel like the judicial system is a good forum for adjudicating those types of disputes."

And while the high court likely wouldn't address Khosla's lack of compliance with the California Coastal Commission by not applying for a permit, lawyers say a U.S. Supreme Court opinion in the case would offer guidance in that area to states as they wrestle with how they regulate privately owned beaches.

"One of the implications is what I would call the creep of interpretation of development under the Coastal Act. Will other states' regulations be expanded to allow a broader interpretation of development? ... It's a slippery slope. There is a yin and yang of how much the public is entitled to infringe on private property," De Felice said.

Indeed, a decision by the high court would give further clarity on the issue, as coastal states continue to wrestle with the question of the line between private property rights and public access.

And U.S. Supreme Court opinion on the matter could also influence the decisions of private property owners, experts say.

"If it goes there, I think it gives private property owners that have beachfront property ... a better, more clear idea of ... where their rights start and stop and where the public's rights start and stop," said Saul Ewing's Neil Schiller. "Having the court really sort of make that line brighter and more distinct will be helpful."

Counsel for the defendants couldn't be immediately reached for comment.

Surfrider Foundation is represented by Joseph Cotchett and Eric Buescher of Cotchett Pitre & McCarthy LLP and Mark Massara and Herb Fox.

The petitioners are represented by Erin Murphy and Paul Clement of [Kirkland & Ellis LLP](#) and Allonn Levy, Jeffrey Essner and Dori Yob of [Hopkins & Carley](#).

The appellate case is Surfrider Foundation v. Martins Beach 1 LLC et al., case number A144268, in the Court of Appeal of the State of California, First Appellate District, Division Five.

--Additional reporting by Melissa Daniels. Editing by Philip Shea and Aaron Pelc.

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