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 a Writ of Certiorari to the First Appellate District Court of Appeal of the State of California

BRIEF OF THE CALIFORNIA BUSINESS PROPERTIES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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RULE 29.6 STATEMENT

California Business Properties Association has no parent company, and no publicly held company holds any ownership interest in the entity.

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BRIEF OF THE CALIFORNIA BUSINESS PROPERTIES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

California Business Properties Association ("CBPA") respectfully submits this *amicus curiae* brief in support of the Petition for Writ of Certiorari of Petitioners Martins Beach 1, LLC and Martins Beach 2, LLC. CBPA has received the parties' written consents to file this brief as amicus curiae in support of the petitioners.[1]

CALIFORNIA BUSINESS PROPERTIES ASSOCIATION'S INTERESTS ARISE BECAUSE THE RIGHT TO EXCLUDE OTHERS FROM PRIVATE PROPERTY IS OF SIGNIFICANT CONCERN TO ITS MEMBERS

CBPA is a commercial real estate trade association that serves as the legislative and regulatory advocate for property owners, tenants, developers, retailers, contractors, land use attorneys, brokers, and other professionals in the commercial real estate industry. With over 10,000 members, CBPA is the largest consortium of commercial real estate professionals in California.

CBPA is the designated legislative advocate for the International Council of Shopping Centers (ICSC), NAIOP of California, the Commercial Real Estate Developers Association (NAIOP), the Building Owners and Managers Association of California (BOMA), the Retail Industry Leaders Association (RILA), the Institute of Real Estate Management

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[1] No counsel for any of the parties authored any part of this brief. No person or entity other than the CBPA has made any monetary contribution to the preparation or submission of this brief.

(IREM), the Association of Commercial Real Estate – Northern and Southern California (ACRE), the National Association of Real Estate Investment Trusts (NAREIT), AIR Commercial Real Estate Association, and the California Association for Local Economic Development (CALED).

CBPA is the recognized voice of all aspects of the commercial, industrial, and retail real estate industry in California. Its members range from some of America's largest retailers and commercial property owners and tenants to individual and family run commercial real estate interests.

CBPA supports the Petition for Writ of Certiorari in this case. The ability to exercise rights to exclude the public from private property when there is no established right of public access is extremely important for commercial property owners. Every private property owner invests in real estate with the expectation that, in the absence of an established public right, their ownership includes the right to exclude public passage over their property of any duration. The right to exclude is a fundamental premise that underlies private ownership and affects every owner's ability to control their properties in fundamental ways. The Fifth Amendment protects abridgement of this right through government action, by prohibiting the taking unless government first compensates the owner.

As a result of the California court of appeal's decision in this case, an owner's right to exclude public access over and use of private property is now qualified in California. Under the court of appeal's decision, a *per se* taking would occur only when public use is of an unlimited duration. Under this decision, any public access over private property

whose duration could be limited would not be a taking unless the property owner or tenant proves that at some undefined point in time a taking has occurred based on this Court's ad hoc multi-factor takings analysis.

The court of appeal's decision represents a significant departure from the longstanding principles regarding the nature of the right to exclude public use of private property – an essential stick in the bundle of protected property rights - which has significant consequences for commercial real estate. This departure opens the door for the State and localities to adopt or enforce laws that compel property owners to accept uninvited public access for "limited durations" without incurring any liability for a taking unless the owner can afford to successfully litigate a balancing test in court after first going through an administrative process. The court of appeal's decision would curtail a right that is fundamental to property ownership.

SUMMARY OF THE ARGUMENT

This case involves an extremely important issue. It concerns a property owner's or tenant's right to exclude the public from private property in circumstances where there is no recorded easement or adjudicated right of public access. In this case, property owners who voluntarily allowed public recreational access and use over their private property decided to discontinue that practice. They exercised their right to exclude the public from entering their property without their permission.

In this case, the owners are not proposing to erect any structure or engage in any activity that would be commonly understood to be development.

The only activity contemplated involves no longer inviting the public to descend a private road to a private beach. The acts consist of closing an existing gate, employing security guards to ward off trespassers on the property and painting over a sign advertising the use that the owners are discontinuing.

In practical terms, the California court of appeal decision holds that the property owners cannot exercise their right to exclude others and must allow ongoing and continuous public recreational access over their property until such time as they apply for and obtain a coastal development permit allowing the owners to exercise that right.

The fundamental question raised by the Petition is whether a state law, in this case the California Coastal Act, can compel an owner in such circumstances, to incur the expense and go through the process of obtaining a permit before the owner can exercise that right.

The issue stems from this Court's use of the word "permanent" in its physical takings jurisprudence. As articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), a *per se* taking occurs when governmental action results in "permanent physical occupation" of the property by the government itself or by others. *Nollan* states, "[O]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," (*Nollan*, *supra*, at 831-832, quoting *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 434-435 (1979). *Nollan* then states, "We think a 'permanent physical occupation' has occurred, for

purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, *supra*, at 832.

There is no question in this case that California courts have interpreted the California Coastal Act to require the Martins Beach owners to suffer continuous unwelcomed public recreational use of their property. The question is whether it is "permanent."

Specifically, the question is whether "permanent" means "established" or "fixed," in which case the government mandated public invasion in issue is a *per se* taking, or whether it means "unending," in which case the current ongoing invasion is only a temporary taking, subject to this Court's complicated, ad hoc multi-factor takings analysis.

The answer to this question determines whether government can enact a law requiring an owner or tenant to continue to allow unwelcomed recreational use of private property until a permit is obtained to discontinue it or whether a law that fixes a period of unconsented public recreational use of private property in this way violates the Takings Clause.

There is a compelling need for the Court to resolve this issue. The right to exclude others from private property protects a core interest that all of us have in our private property. That interest is violated whenever an uninvited invasion occurs. Our sense of violation does not depend on whether the

continuous uninvited invasion is unending or eventually terminable.

Conditioning the exercise of the right to exclude others on obtaining a permit akin to a California coastal development permit restricts the right to those who have the wherewithal to go through that process. Obtaining a coastal development permit in California is a costly multi-year endeavor that many simply cannot afford. Conditioning the exercise of the essential right to exclude others on running California's coastal permitting gauntlet converts a universal right to one that is only available to those who can afford to exercise it and have the fortitude to go through it.

Furthermore, interpreting the Court's use of the word "permanent" to mean that only unending invasions are *per se* takings allows government to create scenarios where the ongoing, continuous invasion is not unending in theory, but never ending in practice. It is an outcome that renders the right to exclude illusory.

These outcomes do not obtain if "permanent" means "established" or "fixed" instead of "unending." The fact that lower courts are split on the meaning of this Court's terminology, and the split leads to dramatically different results with significant consequences, highlights why this Court should grant certiorari. The fact that the outcome in this case will affect the exercise of a fundamental property right along 1,100 miles of this nation's coastline underscores the importance of granting certiorari.

ARGUMENT

I. Resolving The Meaning Of "Permanent" Is Of Critical Importance

A property owner's ability to exclude the uninvited from their private property is not an abstract concept. We all rely in one degree or another on the ability to exclude the uninvited from our premises. It is fundamental to a sense of safety, security, privacy and control that we expect when we retreat from the public domain to our private spaces.

"The notion of exclusive ownership as a property right is fundamental to our theory of social organization. In addition to its central role in protecting the individual's right to be let alone, the importance of exclusive ownership—the ability to exclude freeriders—is now understood as essential to economic development, and to the avoidance of the wasting of resources found under common property systems." *Hendler v. U.S.,* 952 F.2d 1364, 1375, (Fed. Cir. 1991)

As this Court observed in *Nollan*, "Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Nollan*, *supra*, at 831, quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)

The right to exclude others protects our core interest in not experiencing an unwelcomed, government mandated invasion of our private domain. The violation of that interest does not depend on whether the government mandate causing the unwelcomed invasion lasts forever or for a day. It depends on the fact that an invasion occurs as a result of a government mandate.

The protection of this core interest corresponds with the reason a government mandated physical invasion is a *per se* taking. *Nollan* is clear that when it comes to a taking resulting from permanent and continuous public passage over private property, courts do not look at the economic impact on the owner relative to the public benefit. *Nollan, supra*, at 832. This is true because the core interest that the right to exclude protects – to be free of unwelcomed invasions of private property – is not qualified in its nature.

No doubt there are questions whether minor, incidental, unintended or inconsequential invasions cross the threshold between an ordinary trespass and a taking of the right to exclude. The Court's use of the term "permanent" allows for such a distinction. However, this case clearly crosses the threshold. There is no dispute that the Martins Beach owners are enduring a government mandated ongoing and unwelcomed public invasion on their unquestionably private property.

There is also no dispute that if the invasion in this case is "permanent," it is a *per se* taking. The court of appeal decision recognizes that the invasion is a *per se* taking if it is "permanent" in the sense of unending. If, however, "permanent" means "established" or "fixed," the invasion is a *per se*

taking at the moment the invasion occurs as a result of a government mandate.

Limiting a *per se* physical occupation taking to unending invasions disconnects the right from the interest it protects. There is no justification for calling a violation of the right to exclude others from private property a *per se* taking only if it's unending, but not a *per se* taking if it might end someday. Under either characterization, the owner or tenant experiences the same violation of their sense of safety, security, privacy and control that an unwelcomed invasion of their private property entails.

In the end, a "permanent physical occupation" turns on whether the government mandate is fixed and whether the public use of the private property pursuant to that mandate has occurred. See e.g. *Hendler v. U.S.,* 952 F.2d 1364, 1377 (Fed. Cir. 1991) ["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"].

By interpreting "permanent" to mean "unending," the court of appeal classifies all potentially terminable invasions as temporary takings, subject to the murky ad hoc balancing of public interests and private investment backed expectations, which *Nollan* very clearly states does not apply to a "permanent" physical occupation taking. Here again, there is no justification for the distinction, when the effect of the violation on the property owner or tenant is the same.

The court of appeal's conclusion relies heavily on *Arkansas Game and Fish Commission v. U.S.,* 568 U.S. 23 (2012). According to the court of appeal, *Arkansas Game* reaffirms the limited scope of the Court's *per se* physical invasion takings jurisprudence. *Surfrider Foundation v. Martins Beach 1, LLC*, 14 Cal.App.5th 238, 273 (2017).

There is a big difference between the nature of the taking this Court was addressing in *Arkansas Game* and the ongoing public recreational use invasion occurring here. *Arkansas Game* concerned whether periodic flooding attributed to a public works project was a taking. This Court's analysis recognized that a taking in a flooding context inherently involves an interplay between natural forces and government action, which is not susceptible to a *per se* rule. The question in *Arkansas Game* was whether subjecting private property to natural forces that periodically inundate a property could result in a taking. In that context, this Court concluded that the temporary flooding could be compensable if it reached the point of being a taking under the ad hoc, multi-factored, situational taking analysis this Court set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-130 (1978).

Here, there is no interplay between natural forces and government acts that leaves in question whether a physical occupation taking has occurred. The California courts have very clearly held that the owners are compelled by the California Coastal Act to remain open for ongoing, continuous public recreational use of their private property. The owners here experience the same violation whether

this unwelcomed invasion is unending or potentially terminable.

In this case, the burden is permanent in that it is established. The landowners are compelled by state law to accept ongoing and continuous public access unless and until they navigate a costly and arduous process to obtain government approval to exercise the most fundamental of private property rights.

The difference between whether this Court's use of the word "permanent" means "established" or "unending" is the difference between whether the right to exclude serves the interests that it purports to protect. The split in the case law over the meaning of "permanent" leads to profoundly different outcomes that fundamentally affect all property owners and tenants who rely on the right to exclude the uninvited from their private premises in daily life.

The outcome in this case will immediately affect how the California Coastal Commission will implement the Coastal Act along California's 1,100 mile long coast. There is an urgent need for the Court to resolve what it means in using the word "permanent" in its physical occupation takings jurisprudence.

II. Conditioning The Exercise Of The Right To Exclude Others On Governmental Approval Places The Right Beyond The Reach Of Many

Obtaining a coastal development permit ("CDP") in California is not an over-the-counter proposition. It is an expensive and lengthy process that many cannot afford.

Throughout most of California's coastal zone, the process begins in the city or county (in the case of land located in an unincorporated area). The Coastal Act requires cities and counties in the coastal zone to prepare and obtain Coastal Commission approval of a local coastal program ("LCP"), consisting of land use plans, zoning maps and ordinances which implement the Coastal Act in that jurisdiction. Cal. Pub. Res. Code §§30500(a), 30106.6. Once the Commission has certified that a locality's LCP is consistent with the Coastal Act, permitting authority shifts to the city or county. Cal. Pub. Res. Code §§30619(a), 30600(d). The city or county's approval of a CDP on land between the sea and the first public road paralleling the sea (which would encompass virtually all beach access permits) can be appealed to the Coastal Commission either by an "aggrieved person" or by two members of the Coastal Commission. Cal. Pub. Res. Code §§30603(a)(1), 30625(a), 30801.

Martins Beach is located in unincorporated San Mateo County, which has a Coastal Commission certified LCP. San Mateo County Zoning Regs §6328 *et seq*.[2] The permitting process under that LCP is typical of the process found in other LCPs along California's 1,100-mile coast.

The first step is to submit an application, which can take time to prepare. In fairly open ended fashion, the San Mateo County Planning Director is allowed to require the application to include any information the Director determines is necessary for

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[2] The January 2018 Edition of the San Mateo Zoning Regulations can be found at: https://planning.smcgov.org/sites/planning.smcgov.org/files/SMC_Zoning_Regulations.pdf

evaluation of the proposed "development." San Mateo County Zoning Regs §6328.7(f).

Under California's Permit Streamlining Act, the County does not begin to process the application for a decision until the County determines that the application is complete. Cal. Gov't Code §65943 *et seq*. When an application is submitted, the County has 30 days in which to inform the applicant that the application is incomplete, at which point an applicant must revise the application to continue the process. Cal Gov't Code §65943.

There is no limit on the number of times a city or county can determine that an application is not complete. That determination can require an applicant to provide additional information that can take weeks or months to prepare each time. While the Permit Streamlining Act attempts to limit the grounds on which an application can be found to be incomplete (Cal. Gov't Code §§65940, 65941, 65943), even if the grounds are questionable, litigating the issue is frequently not a viable option given the time and cost involved.

Once an application is determined or deemed to be complete under the Permit Streamlining Act, the County would have 180 days to approve or disapprove the application, which can be extended by 90 days with the applicant's consent. Cal. Gov't Code §§65950(a)(1), 65957.

Like other LCPs, the County LCP requires a public hearing before either the County Zoning Administrator or the County Planning Commission[3] with respect to any permit that could be appealed to

[3] Many smaller jurisdictions have only a planning commission.

the Coastal Commission (which would apply to any permit to close a beach access). San Mateo County Zoning Regs §6328.9. A Zoning Administrator's decision can be appealed to the Planning Commission, which, in turn, can be appealed to the County Board of Supervisors. San Mateo County Zoning Regs §6328.16. In each case, the body hearing the appeal engages in a de novo review of the application. San Mateo County Zoning Regs §6328.12.

However, the Permit Streamlining Act does not apply to appeals. Cal. Gov't Code §65922(b). There is no time limit on when the Planning Commission or Board of Supervisors must hear the appeal.

If the Board of Supervisors approves the CDP, that decision can then be appealed to the California Coastal Commission. Cal. Pub. Res. Code §30603(a)(1); San Mateo County Zoning Regs §6328.16(b). The Commission engages in another de novo review in which it determines whether the application complies with the County LCP and the Coastal Act's public access policies, which state that the Commission is required to maximize public access. Cal. Pub. Res. Code §§30621, 30603(b), 30210.

Under the California Coastal Act, the Commission is required to hear an appeal, unless the Commission determines that the appeal does not raise a "substantial issue." Cal. Pub. Res. Code §30625(b)(1). Although the Coastal Act requires the Commission to act on an appeal within 49 working days, California courts have held that the 49-day rule is satisfied when the Commission determines whether an appeal raises a substantial issue within that time frame, without deciding the merits of the

appeal. Cal. Pub. Res. Code §30621(a); *Coronado Yacht Club v. California Coastal Com.*, 13 Cal.App.4th 860, 866-873 (1993). In many cases, the applicant will waive the 49-day rule, so that the substantial issue determination occurs when the merits of the appeal are heard.

Once the 49-day rule is addressed, there is no time limit on when the Commission hears the merits of the appeal. The Commission has been known to take a year or more to hear an appeal.

Thus, obtaining a CDP can be a multi-year odyssey in which an applicant can be required to go through three or four rounds of public hearings and decisions before receiving a permit. Along the way, the applicant can incur substantial costs associated with that process. In addition to the monetary cost, there can be an emotional toll on the applicant. The applicant has to go through successive public proceedings in which the applicant may be exposed to the kind of harassment, scorn and derision that the Martins Beach landowners have had to endure in this case. All the while, the landowner/applicant is doing nothing more than attempting to exercise a fundamental right to exclude others from the owner's private property.

Not everyone on California's 1,100 mile long coast has the means and the fortitude to brave this gauntlet. The idea that a physical invasion is not permanent because the owner may be able to eventually obtain a CDP presumes, incorrectly, that everyone in this situation can do so.

Requiring property owners and tenants to go through a lengthy and expensive permitting process would mean that the right to exclude others would be

available to those who can afford to secure it and have the wherewithal to go through it.

The difference between "permanent" meaning "established" or fixed" and "permanent" meaning "unending" is the difference between whether the right to exclude others from private property is afforded to all or is available only to those who can afford it.

III. Interpreting "Permanent" To Mean "Unending" Instead Of "Established" Produces Outcomes That Eviscerate A Basic Property Right

Neither the County nor the Coastal Commission can use the permitting process to take private property. In the first instance, California law limits the power to compensate an owner for a taking to judicial proceedings. Under Article 1, Sec. 19 (a) of the California Constitution, "Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." "The only legal procedure provided by the California Constitution and statutes for the taking of private property for a public use is by way of a condemnation. *City of Needles v. Griswold,* 6 Cal.App.4th 1881, 1896 (1992).[4]

Nor could the County or Coastal Commission deny an application to terminate public use of the private property in a case such as this. This Court's decision in *Nollan v. California Coastal Commission*,

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[4] Furthermore, the Coastal Commission "is not vested with the authority to adjudicate the existence of prescriptive rights for public use of privately owned property." *LT-WR, L.L.C. v. California Coastal Com.*, 152 Cal.App.4th 770, 806 (2007).

instructs that "the outright taking of an uncompensated, permanent, public-access easement would violate the Takings Clause." *Nollan*, *supra*, at 825. In any sense of the word "permanent," an outright denial that would require the owner to accept an unending, unwelcomed public recreational invasion of the property would be a *per se* taking, which neither the County nor the Coastal Commission have the authority to effect in a land use approval process.

Nollan also instructs that conditioning a CDP on requiring a permanent easement would be a lawful land-use regulation only if it substantially furthered governmental purposes that would justify denial of the permit. *Nollan*, *supra*, at 825. In *Nollan*, this Court held that the Coastal Commission could not impose a condition requiring public access across a private beach in connection with the redevelopment of a residential lot because the Commission could not deny the permit on the grounds that the access was not provided.

In this case, a CDP to exercise the right to exclude could not be denied because the denial would be a *per se* taking. As a result, under *Nollan* neither the County nor the Commission could impose conditions on the CDP, because there is no governmental purpose that would justify a denial of the permit.

There is equally no legitimate governmental purpose that justifies requiring owners or tenants to accept an unwelcomed public invasion of their private property while going through a process to obtain a permit that neither the County nor the Commission could deny or condition. This outcome is avoided if "permanent" means "established" or

"fixed," because a *per se* taking would occur whether the governmentally compelled invasion is unending or terminable.

However, if "permanent" means "unending," it opens the door to an entirely different outcome that could require a private land owner or tenant to endure an ongoing unwelcomed public invasion of their private property indefinitely. For example, it is not difficult to conceive of a circumstance where the County or the Coastal Commission "approves" a CDP to discontinue public recreational access and use on the condition that the owner must continue to allow the unwelcomed invasion for, say, ten years. The condition would require that, at the end of ten years, the owner must prove to the Commission (an agency committed to maximizing the public use of the property) that remaining open would constitute a taking under this Court's multi-factor ad hoc takings analysis. The condition would then require that if the owner fails to make the showing to the Commission's satisfaction, the uninvited use would continue until such time as the owner makes such a showing to the Commission's satisfaction.

This is not a farfetched proposition. In many parts of the California coast, the Coastal Commission has a policy of approving only the minimum amount of development necessary to avoid a taking.[5] It

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[5] Two good examples are in the staff reports the Commission adopted as its findings in connection with its 2011 denial and 2015 approval of five owners' applications to build homes on their respective lots in the Malibu area. The 2011 takings findings can be found at https://documents.coastal.ca.gov/reports/2011/6/Th13c-s-6-2011.pdf at pages 204 – 238 (corresponding to pages 74 – 109 of the staff report following the addendum). The 2015 findings

routinely makes findings in approving and denying CDPs regarding whether the decision would constitute a taking, citing this Court's takings jurisprudence. It would not be a stretch for the Commission to devise an approach that would compel public use of private property for as long as the Court's ad hoc takings analysis would allow it.

If the word "permanent" means "established" or "fixed," the foregoing condition would be a *per se* taking on its face, since it would establish ongoing and continuous public use of private property from the get go.

If the word "permanent" means "unending," the foregoing "approval" might not be considered a taking because the permit theoretically allows the owner to terminate the use at some point, provided the owner carries the difficult burden of proving a complicated and murky legal proposition before an agency with an adverse interest in the outcome, whose decision is subject to a deferential standard of judicial review under California law.[6]

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are found at https://documents.coastal.ca.gov/reports/2015/12/th17a-s-12-2015.pdf at pages 85 - 92

[6] Judicial review of any decision or action under the Coastal Act is reviewable only by writ of mandate. Pub. Res. Code §30802. The inquiry is whether the Commission (or city or county) prejudicially abused its discretion, which occurs when the decision is arbitrary, capricious, in excess of the agency's jurisdiction, entirely lacking in evidentiary support, or without reasonable or rational basis as a matter of law. Cal. Code Civ. Proc. §1094.5(b). A prejudicial abuse of discretion is established if the Commission (or city or county) has not proceeded in a manner required by law, if its decision is not supported by findings, or if its findings are not supported by substantial evidence in the record. Cal Code Civ. Proc.

Since no one can say what the County or Commission would do in the future (and it is theoretically possible the agency could allow the owner to discontinue the use at some point), one could argue that the invasion is not "permanent" in the sense of unending. Although the compelled use could theoretically end at some point, it would never end in practice if the owner cannot prove to the government's satisfaction that continuing the invasion would be a taking under the Court's ad hoc multi-factor test.

Of course, the owner could choose to litigate the question of whether the Commission had substantial evidence in its record (in a proceeding where the rules of evidence do not apply)[7] to support its refusal to allow the uninvited use to end under this Court's murky ad hoc takings analysis. That litigation likely would have to occur before the question of compensation for a taking could be litigated. All of this would make the process, which is already more than many can bear, even more unattainable. All the while, the owner is compelled to endure an ongoing, unwelcomed public recreational invasion of his or her private property.

Again, all of this turns on the meaning of this Court's use of the word "permanent" in describing a

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§1094.5(c). "The decisions of the agency are given substantial deference and are presumed correct. The parties seeking mandamus bear the burden of proving otherwise, and the reviewing court must resolve reasonable doubts in favor of the administrative findings and determination." *Sierra Club v. County of Napa*, 121 Cal.App.4th 1490, 1497 (2004)

[7] The Coastal Commission's regulations state that a Coastal Commission "hearing need not be conducted according to technical rules relating to evidence and witnesses." Cal. Code of Reg., Tit. 14, § 13065.

per se physical occupation taking in its jurisprudence. It has reached the point in this case where an interpretation of "permanent" is affecting, in significant and fundamental ways, our ability to exercise our basic right to exclude others from our private property.

CONCLUSION

For all of the foregoing reasons, as well as for the reasons stated by the petitioners, the Court should grant the Petition for Writ of Certiorari in this case.

Respectfully submitted.

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