No. ____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a stretch of private property along the California coast known as Martins Beach. The California Coastal Commission and the County of San Mateo want Martins Beach to be open to the public, but they do not want to pay to purchase the property, or even for an easement. Instead, they have taken the position that the owner of the property cannot exclude the public unless it first obtains a *permit* deemed necessary for any change, including a decrease, in the "intensity" of the public's use of or access to the ocean under the California Coastal Act. In their view, because the previous owner of Martins Beach chose to allow members of the public to access the property upon payment of a fee, the current owner must do so as well—and on the exact same terms, no less—unless and until it obtains a permit allowing it to do otherwise.

Respondent Surfrider Foundation took up their cause and convinced the state courts to accept that capacious interpretation of the Coastal Act and to enjoin petitioner from excluding the public from its private property unless and until it obtains a "coastal development permit" allowing it to do so. While the court below recognized that this injunction against exercising the right to exclude constitutes a textbook physical invasion of private property, it nonetheless concluded—in a decision that deepens an entrenched split among the lower courts—that it is not a compensable taking because the possibility of obtaining a permit renders the physical taking "temporary," and only "permanent" physical takings qualify as *per se* takings. Thus, under the decision

below, petitioner is entitled to zero compensation for a compelled public easement across its private property because of the possibility petitioner could one day obtain a permit allowing it to exercise the most foundational property right, *i.e.*, the right to exclude.

The questions presented are:

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.

PARTIES TO THE PROCEEDING

Defendants-appellants below, who are petitioners before this Court, are Martins Beach 1, LLC, and Martins Beach 2, LLC.

Plaintiff-appellee below, who is respondent before this Court, is Surfrider Foundation.

CORPORATE DISCLOSURE STATEMENT

Martins Beach 1, LLC and Martins Beach 2, LLC have no parent company, and no publicly held company owns 10% or more of the stock of either entity.

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PETITION FOR WRIT OF CERTIORARI

No property right is more fundamental than the right to exclude. It is what makes "private property" private. According to the decision below, however, owners of private beachfront property in California may not exercise that right without first obtaining the government's permission. Absent such a permit, a property owner is compelled to give the public access to private property on the same terms as prior owners, even if it means losing money and being forced to advertise the very access that the private property owner would like to foreclose.

Petitioner is the owner of Martins Beach, a stretch of private beachfront property along the California coast. After losing money operating a business of allowing the public to enter and use its private property for a fee, petitioner decided to shut down the business and keep its private property private. The California Coastal Commission and the County of San Mateo had other ideas. Citing a provision of the California Coastal Act that requires property owners to obtain a permit before taking any action that would alter the "intensity" of public access to the ocean, the government authorities demanded that petitioner obtain a permit before exercising its right to exclude. To be clear, all agree that petitioner owns the property in fee simple absolute. But the Coastal Commission and the County nonetheless declared the power not only to mandate that the property be kept open to the public unless petitioner obtains a permit to close it, but to dictate essential aspects of how petitioner must invite the public onto its private property—including the hours it must

allow access, the absurdly low price ($2) it may charge, and even the extent of advertising alerting the public of its ability to access petitioner's private property for a pittance.

The decision below embraced that exceptionally broad interpretation of the state statute, holding that the Coastal Act requires petitioner to obtain a permit to take actions as basic as closing its own gate, posting security guards on its own property to deter trespassers, and even painting over its own sign advertising access to the property. At the same time, however, the court recognized that compelling petitioner to keep its property open to the public compels a public-access easement over petitioner's property. The court even acknowledged that a public-access easement is a *per se* physical taking and would automatically require compensation if it were permanent. Yet the court nonetheless refused to apply that *per se* rule here, on the theory that the possibility of obtaining a permit rendered the physical taking that presently exists "temporary," and only "permanent" physical takings require compensation without regard to the regulatory taking balancing test.

That remarkable conclusion cannot be reconciled with this Court's takings precedents, and it is directly contrary to decisions from the Federal Circuit and several other state courts. Those decisions all recognize that when the government physically invades private property (or invites others to do so), the property owner is categorically entitled to just compensation, regardless of the invasion's duration. Just as was the case when the government

temporarily seized factories and coal mines during World War II, the duration of the physical invasion is relevant to the amount of compensation due, not to whether there was a compensable taking in the first place. When the government commands that private property owners allow the public to continuously and physically invade their private property, the government has imposed a public-access easement and effectuated a *per se* taking, full stop.

Precisely because a physical invasion is a *per se* taking even when its duration is indefinite, the Coastal Act, as interpreted by the decision below, works an unconstitutional taking. The government simply cannot command that parties open their private property to the public without compensation. And it certainly cannot command that parties keep their private property open to the public at a loss, and advertise the opportunity to "trespass" for a mere $2 fee, all without providing just compensation. The remarkable interpretation of the Coastal Act embraced by the decision below runs afoul of the Takings Clause, the Due Process Clause, and the First Amendment. This Court should grant certiorari to resolve the division among the courts over whether a physical invasion of private property is a *per se* taking without regard to its duration, and to confirm that the Coastal Act cannot constitutionally be applied to compel uncompensated physical invasions of private property.

OPINIONS BELOW

The California Court of Appeal's opinion is reported at 14 Cal.App.5th 238 and reproduced at App.1-66. The trial court's order granting injunctive

relief is available at 2014 WL 7010647 and reproduced at App.68-71. The trial court's statement of decision is available at 2014 WL 6634176 and reproduced at App.72-99.

JURISDICTION

The California Court of Appeal issued its opinion on August 9, 2017, and the California Supreme Court denied review on October 25, 2017. On January 12, 2018, Justice Kennedy extended the time for filing this petition to February 22, 2018. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First, Fifth, and Fourteenth Amendments and the relevant provisions of the California Coastal Act are reproduced at App.100-102.

STATEMENT OF THE CASE

A. Factual Background

1. This case concerns approximately 89 acres of property along the California coast known as Martins Beach. Like many parcels of property along the California coast, Martins Beach is and always has been private property. The property borders the Pacific Ocean and is sheltered from the north and south by high cliffs that stretch out into the ocean, forming a cove. App.1. Given this natural physical geography, the only way to access the cove other than by boat is from the east. But the state has never purchased or leased any public right-of-way to access the cove; instead, the only access is via a private road that is part of the Martins Beach property. App.1-2. Unsurprisingly, this makes Martins Beach a very

attractive (and very valuable) piece of property, as nature has left it largely insulated from the outside world.

For roughly a century, Martins Beach was owned by a family called the Deeneys. Tr.2467.[1] While there was never any dispute that the property was their private property, the Deeneys chose to use it as a revenue-generating beach-access business. The Deeneys did not keep their private property open to the public at all times. Rather, on days and at times of their choosing, they would open the gate to their private road and allow patrons to enter and use their property upon payment of a fee. *Id.* After paying the fee set by the Deeneys, patrons could use the private road to enter the Deeneys' property, park in the parking lot the Deeneys built and maintained, and use the beach and other amenities the Deeneys built and maintained, including restrooms and a small convenience store. *Id.* To deter people from enjoying their private property without paying the fee, the Deeneys maintained "no trespassing" signs on their gate, which they opened and closed at their discretion. Tr.3121. While the Deeneys originally charged only $0.25 to access their beach, over time, they gradually increased the fee to $2 and ultimately $10. But by the 2000s, their business was no longer profitable, and they ultimately decided to sell the property. Tr.2468; RT879-880.

Petitioner purchased the property in July 2008. Tr.2468. Initially, petitioner was willing to give the

[1] Citations to "Tr." refer to the Clerk's Transcript, and citations to "RT" refer to the Reporter's Transcript, in Case No. A144268 in the court below.

business a go, and continued to allow members of the public to access the property upon payment of a fee. Tr.3121; App.4. But petitioner soon faced the same problem the Deeneys had faced: The business was operating at a considerable loss, as the costs of keeping the beach, the parking lot, and other facilities in operable and safe condition significantly exceeded the fees the business generated. Nonetheless, for the time being, petitioner kept the business open, while painting over the billboard the Deeneys had erected advertising the business until petitioner could decide how to put it to more attractive use.

2. In February 2009, the first winter that petitioner owned the property, it followed the Deeneys' practice of temporarily closing the property to the public until the weather improved, and posted a sign on the gate stating "Beach Temporarily Closed." App.4. While that practice had never drawn any objection during the many decades the Deeneys followed it, this time it prompted an immediate "Informational Warning Letter" from San Mateo County. The County, which shares power with the California Coastal Commission to enforce the California Coastal Act, Cal. Pub. Res. Code §30000 *et seq.*, maintained that "any change in the public's ability to access the shoreline at Martins Beach triggers the need for a CDP [*i.e.*, "coastal development permit"] because it represents a 'change in the intensity of use of water or access thereto.'" App.4-5 (quoting Cal. Pub. Res. Code §30106). Accordingly, the County sought a schedule of the hours and days petitioner intended to open its private property to the public, and an explanation of "how the schedule relates to historic patterns of public use," so it could

evaluate whether petitioner engaged in unpermitted "coastal development" by closing its own gate to its own property. App.4. The County also sought an explanation for petitioner's decision to paint over its own sign, on the premise that this, too, may have produced a "change in the intensity of use of water or access thereto" and thus constitute unpermitted "coastal development."

Petitioner responded by explaining that the property was traditionally closed during the winter, and that although petitioner was not required to invite the public onto its private property, it "voluntarily intended to maintain the same amount and type of access as did [its] predecessors." App.5. As to the sign, petitioner explained that it had not decided what message, if any, to place on it and was unaware of authority requiring it to display a particular message on its own sign. Tr.2469, 3868.

Two months later, the County responded, again claiming that petitioner had to apply for a CDP before taking any action that might affect public access to the beach. App.5. The County also cited the California Coastal Access Guide, published by the California Coastal Commission, which stated that access to the beach was historically available year-round for a $2 fee. App.5; Tr.2470, 3870-73. The County advised petitioner that it must either: (1) immediately allow public access on a year-round basis for a $2 fee; (2) provide evidence documenting that the specific times, hours, terms, and fees under which petitioner was operating the beach were the same as those in place in 1973 (the year the CDP requirements took effect); or (3) apply for a CDP authorizing any changes in the

times and terms of public use. App.5-6; Tr.2470, 3870-73.

Petitioner again informed the County that although it was not legally required to do so, it was allowing paying members of the public to access the property on the same terms as the Deeneys had, and would continue to do so, except that it would raise the fee from $10 to $15 to help cover expenses. App.5; Tr.2470, 3875-78, 4219-22. Although the Deeneys had raised the fee several times over the years without objection, the County persisted in its view that *petitioner* must invite the public onto its property on the exact same terms and conditions—including the same $2 fee unadjusted for inflation—that governed *in 1973*, or else apply for a CDP. Tr.2470.

3. Frustrated with the persistent claims that it lacked the right to decide whether and on what terms to invite the public onto its private property, petitioner initiated a lawsuit in June 2009 against the County and the Coastal Commission seeking to resolve, by declaratory judgment, whether the Coastal Act actually requires a private property owner to obtain a development permit to exercise its right to exclude in ways that, if anything, would only decrease the "intensity" of the public's use of or access to the ocean. App.5. The trial court dismissed the action, concluding that the dispute was not yet ripe. App.5. At that point, petitioner decided to close its private property to the public altogether and cease operating the money-losing business. App.6.

Two years later, in September 2011, the Coastal Commission sent petitioner a letter claiming that "the erection of beach closure signs … as well as the

permanent closure of an existing gate … constitute development under the Coastal Act." App.6. The County followed up shortly thereafter with a Notice of Preliminary Determination of Violation claiming that petitioner had engaged in "unlawful" unpermitted coastal development. App.6-7; Tr.2473, 3889-92. At that point, petitioner implored the county to issue a Final Staff Determination of Violation so petitioner could formally contest that determination in court and finally adjudicate its property rights. Tr.2473, 4238-42. Instead, the County took no further action, just leaving the threat of massive penalties hanging over petitioner's head, in hopes of coercing petitioner to allow the public to access its private property. Tr.2473.

While the County and the Commission continued to pressure petitioner into allowing public access and to frustrate petitioner's efforts to seek legal recourse, an unincorporated association calling itself "Friends of Martin's Beach" ("FOMB") decided to take matters into its own hands and brought a lawsuit against petitioner. FOMB did not contend that petitioner was engaged in unpermitted "coastal development." Instead, FOMB claimed petitioner's private property actually belonged to the public, arguing that the Deeneys "dedicated" the property to the public when they invited people to access it upon payment of a fee. App.6-7. The trial court granted summary judgment for petitioner, ruling that Martins Beach is private property that the public has no legal right to access. The court of appeal affirmed in part, reversed in part, and remanded for a trial on FOMB's dedication claims. *Friends of Martin's Beach v. Martin's Beach 1, LLC*, 201 Cal. Rptr. 3d 516 (Cal. Ct. App. 2016). After a

bench trial, the trial court once again ruled for petitioner, concluding that FOMB failed to establish that the Deeneys dedicated their property to the public by allowing use and access upon payment of a fee. The court has now entered a final judgment confirming that petitioner owns Martins Beach in fee simple absolute and that the property is unencumbered by any right of public access. *See* Judgment, *Friends of Martins Beach*, Case No. CIV517634 (Cal. Super. Ct., San Mateo Cty., Jan. 29, 2018).

Consistent with that understanding, the California Legislature enacted legislation in 2014 giving the State Lands Commission the power to negotiate with petitioner to acquire "a right-of-way or an easement" for the public to use Martins Beach, and if the negotiations were unsuccessful, to try to obtain one through the exercise of eminent domain. *See* Cal. Pub. Res. Code §6213.5. To date, the Lands Commission has declined to attempt to exercise that power, thus leaving Martins Beach as the legislature recognized: private property.

B. Procedural History

In the midst of the FOMB litigation, another public interest group, Surfrider Foundation, initiated this separate litigation. Unlike FOMB, Surfrider did not claim that the public has any pre-existing legal right to access Martins Beach. *See* App.35 n.23. Instead, Surfrider took up the County's and the Coastal Commission's cause, claiming that, even assuming the property is in all respects private (which it is), petitioner engaged in unpermitted "coastal development" in violation of the Coastal Act when it

(1) closed its own gate to its private road; (2) painted over its own sign advertising its private business to the public; and (3) stationed security guards on the property to deter trespassing. App.7.

After a bench trial, the San Mateo County Superior Court entered judgment for Surfrider, ruling that petitioner violated the Coastal Act by closing its gate, painting over its sign, and taking measures to deter trespassers without first applying for a permit. App.8-10. The court entered an injunction requiring petitioner to unlock the gate and to allow the public to access its private property unless and until it obtains a permit to do otherwise:

> [Petitioner is] hereby ordered to cease preventing the public from accessing and using the water, beach and coast at Martins Beach until resolution of [a Coastal Development Permit] application has been reached by San Mateo County and/or the Coastal Commission. The gate across Martins Beach Road must be unlocked and open to the same extent that it was unlocked and open at the time [petitioner] purchased the property.

App.9.

Petitioner appealed, arguing that closing its own gate, painting its own sign, and using security guards to deter trespassers do not constitute "development" under the Coastal Act. Petitioner further argued that if the Coastal Act really does require a private property owner to seek a permit before it may exercise its fundamental right to exclude, or even change the message on a sign inviting the public to use its private

property, then the Act violates the Takings Clause, the Due Process Clause, and the First Amendment. Petitioner also argued that the injunction itself constitutes an unconstitutional taking, as it compels petitioner to keep its private property open to the public *right now* and provides no compensation for that government-mandated public easement.

The court of appeal affirmed. The court began by accepting the trial court's exceedingly broad interpretation of the Coastal Act, holding that *any* act with more than a *de minimis* impact—including a reduction—on the "intensity" of the public's use of or access to the ocean constitutes "coastal development" that requires a permit. App.10-21. Yet notwithstanding its holding that the Coastal Act compels petitioner to open its private property to the public unless and until the government gives it permission to do otherwise, the court rejected as "unripe" petitioner's claim that this permitting requirement violates the Takings Clause, reasoning that petitioner must apply for and be denied a permit before it may challenge the uncompensated public-access easement that the Act imposes. App.22-26.

At the same time, the court *agreed* with petitioner that "the trial court's injunction intrudes on [petitioner's] established property right to exclude others by allowing the public to access Martins Beach." App.27. The court also acknowledged that a court order compelling "a permanent public access easement is generally treated as a *per se* taking requiring compensation." App.41. But instead of following those propositions to their logical conclusion—*i.e.*, that the trial court had imposed an

unconstitutional uncompensated taking—the court concluded that no compensation was required because, in its view, a "temporary" physical invasion does not qualify as a *per se* physical taking.

Instead, according to the court of appeal, "for a physical invasion to be considered a *per se* taking, it must be permanent." App.50. And because there is at least a theoretical prospect that the court-ordered easement may one day end, the court concluded that the physical taking, while indefinite, did not qualify as "permanent." *See* App.42. The court therefore concluded that petitioner is not entitled to any compensation for the state-mandated easement across its private property that presently exists unless it can satisfy the multi-factor balancing test for *regulatory* takings, which the court concluded petitioner failed to do. App.56-60; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

The Supreme Court of California denied review.

REASONS FOR GRANTING THE PETITION

The decision below sanctions an egregious invasion of private property rights—and does so by embracing the wrong side of an entrenched split among the lower courts. The rules governing physical takings of property are quite clear: When the government physically invades private property, it must pay the owner just compensation, period. If the government seizes a factory, bolts a cable box to a rooftop, or compels a public-access easement over private property, the Constitution imposes a categorical duty to compensate the property owner for the taking. The extent of the physical taking in terms of its comprehensiveness and duration may affect the

amount of compensation that is just, but it does not affect the duty to compensate. Thus, while this Court has sometimes used the word "permanent" to describe the government conduct effecting a *per se* physical taking, it has never suggested that the temporary or indefinite nature of a physical taking obviated the obligation to pay or required multi-factor balancing. Instead, the Court has recognized the commonsense principle that if the government seizes a factory for five years, it has a duty to pay just compensation for that five-year period.

The Federal Circuit and several other courts have accordingly correctly held that the duration of a physical invasion is relevant only to the amount of compensation, not to whether there was a taking in the first place. These courts recognize that the government cannot escape paying compensation for a physical invasion just by promising to end the invasion at some future time or by asserting that it had a very good reason for invading private property. Other courts, however—including the decision below—have placed determinative weight on the duration of the physical invasion, holding that "for a physical invasion to be considered a *per se* taking, it must be permanent." App.50. The disagreement among courts on this point is deep, longstanding, and intolerable. It makes no sense for the federal government and the state government to operate under different takings regimes in California just because the federal action will be challenged in the Federal Circuit while state action is litigated in state court.

Under a correct application of this Court's physical takings precedents, a physical taking always demands compensation. And under a correct application of those same precedents, petitioner's property has been unconstitutionally taken several times over. It has been taken by a trial court injunction that presently requires petitioner to hold its private property open to the public unless and until it obtains a government-issued permit to close it. It has been taken by the California Coastal Act, which the court below interpreted to give the trial court the power to impose that injunction. It has been taken by the lower court's extraordinary command that petitioner not only must hold its private property open to the public, but must do so at a loss, and at hours, days, and prices of the government's choosing. And on top of all that, the courts below interpreted the Coastal Act to force petitioner to continue to advertise the government-compelled opportunity to trespass on its property in plain violation of petitioner's First Amendment rights.

There is a name for a government mandate to allow the public to access private property—it is called a "taking," and a *per se* physical one at that, which requires compensation regardless of its duration. There is no name for a government mandate to maintain a privately owned sign alerting the public to the opportunity to trespass on private property for a pittance, at least not in this country—because the First Amendment so clearly prohibits it. This Court should grant certiorari and restore to property owners the freedom to exclude others from their private property, to close the doors of their businesses, to control the message on their signs, and to enjoy the

full panoply of property protections the Constitution promises.

I. The Court Should Grant Certiorari To Resolve A Division Of Authority Over Whether A Physical Invasion Must Be "Permanent" To Be A *Per Se* Taking.

The court below agreed that petitioner is presently subject to an injunction that compels a public-access easement over its private property. The court agreed, moreover, that a public-access easement ordinarily constitutes a *per se* physical taking. Yet the court nonetheless concluded that this physical taking is not compensable because it is not "permanent." That conclusion is irreconcilable with this Court's precedent and deepens an entrenched split among the lower courts over whether a physical taking must be "permanent" to be *per se* compensable.

A. The Decision Below Deepens a Split Among State and Federal Courts.

1. This Court has long recognized two types of takings: physical takings and regulatory takings. Determining whether a land-use regulation is a regulatory taking that demands compensation requires "complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992). The physical takings analysis, in contrast, is simple: If the government condemns, physically appropriates, or compels an easement over private property, then it must pay compensation. Indeed, this Court's physical-takings jurisprudence "is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules." *Tahoe-Sierra Pres.*

Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002). The *per se* rule that governs physical takings is: "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.*. And "compensation is mandated" even if that physical invasion is only "temporary." *Id.*

Consistent with that *per se* rule, the Federal Circuit and most other courts have held that a physical taking of private property *always* demands compensation, regardless of whether it is permanent, indefinite, or temporary. The Federal Circuit's leading case on the issue is *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). There, the plaintiffs owned property near a hazardous waste disposal site, and the government installed wells to monitor the migration of the hazardous substances. *Id.* at 1369. When the plaintiffs alleged a *per se* taking, the government defended on the ground that the wells and monitoring devices were not "permanently" affixed to the plaintiffs' property, and so could not be a *per se* taking. *Id.* at 1375-76. The Federal Circuit disagreed. While the court acknowledged that this Court has used the word "permanent" when referencing physical takings, it explained that "'permanent' does not mean forever, or anything like it." *Id.* at 1376. "A taking can be for a limited term," and the court found that the government's entries onto plaintiffs' property were a *per se* "taking of the plaintiffs' right to exclude, for the duration of the period in which the wells are on the property and subject to the Government's need to service them." *Id.* at 1378.

The Federal Circuit has reaffirmed *Hendler*'s holding several times. In *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573 (Fed. Cir. 1993), for example, the U.S. Navy broke into and assumed control of a warehouse belonging to a subcontractor working at the Guantanamo Bay Naval Station. *Id.* at 1577. Although the subcontractor later abandoned the warehouse, the court held that it was entitled to compensation for the period preceding the abandonment. *Id.* at 1583. Reaffirming that "a 'permanent' physical occupation does not necessarily mean a taking unlimited in duration," the court held that the "limited duration of this taking is relevant to the issue of what compensation is just, and not to the issue of whether a taking has occurred." *Id.* at 1582-83; *see also, e.g.*, *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1363 (Fed. Cir. 2012); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006).

The First Circuit has likewise held that a temporally finite appropriation of property is a *per se* taking. *See Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007). That case addressed allegations that Puerto Rico's Secretary of the Treasury violated the Takings Clause by temporarily withholding insurance premiums to alleviate the Commonwealth's cash-flow problems. *Id.* at 6. In addressing the Secretary's qualified-immunity defense, the First Circuit held that plaintiff pleaded a Takings Clause violation by alleging that the Secretary physically took, "albeit temporarily," $173 million in insurance premiums. *Id.* at 30. The Secretary's "appropriation of the funds," the court

held, "is equivalent to a permanent physical occupation and a *per se* taking for which just compensation must be paid." *Id.* at 28.

New York's highest court has also held that physical invasions are *per se* takings without regard to duration. *See Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1065 n.5 (N.Y. 1989). The city, seeking to ensure the availability of low-cost housing, prohibited owners of certain properties from doing anything with them for five years other than restore them to habitable condition and lease them at controlled rents. *Id.* at 1061. Finding that the law stripped property owners of their "fundamental rights to possess and to exclude," the court held that the law effected "a *per se* physical taking" even though it was not "permanent." *Id.* at 1065 & n.5.

Other state and territorial courts have reached the same conclusion. *See GTE Nw., Inc. v. Pub. Util. Comm'n of Oregon*, 900 P.2d 495, 504 (Or. 1995) (en banc) ("The *duration* of the 'taking' by physical invasion is not relevant to the determination of whether a 'taking' has occurred."); *Isely v. City of Wichita*, 174 P.3d 919, 923 (Kan. Ct. App. 2008) ("We conclude that temporariness … constitutes little more than relevant evidence in determining the amount of damages."); *Gutierrez v. Guam Power Auth.*, 2013 Guam 1, 11 (2013) ("The fact that GPA eventually removed the poles does not relieve GPA of its duty to justly compensate Gutierrez for the period in which the poles were continuously affixed to the property.").

2. In stark contrast, the decision below expressly held that, "for a physical invasion to be considered a *per se* taking, it must be permanent." App.50; *see also*

App.41. In doing so, the court exacerbated an already-entrenched division of authority among the lower courts.

For instance, Iowa's highest court recently held that a *per se* takings claim cannot proceed unless the alleged taking will last forever. In *Brakke v. Iowa Department of Natural Resources*, 897 N.W.2d 522 (Iowa 2017), landowners challenged an order that required them to quarantine land formerly used as a deer preserve for five years after deer harvested on the property tested positive for disease. *Id.* at 526. For that five-year period, the landowners were required to place fences on their property and to allow state employees to enter their property to kill deer. *Id.* at 528. The landowners alleged that this imposed a *per se* physical taking. The Iowa Supreme Court disagreed, insisting that "temporary takings are not *per se* violations but are instead analyzed under the multifactor *Penn Central* test." *Id.* at 548.

South Dakota's and Nevada's highest courts have imposed the same requirement. In *Benson v. State*, 710 N.W.2d 131 (S.D. 2006), the court held that "a physical occupation that is less than permanent, and amounts to no more than a temporary physical invasion does not constitute a classic *per se* regulatory physical taking." *Id.* at 150. And in *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006), the court, after adopting the requirement that all *per se* takings must be "permanent," allowed a challenge to a height-restriction ordinance to go forward only because it found the "permanency" element satisfied. *Id.* at 1125.

The Second Circuit likewise has imposed a "permanency" requirement on *per se* takings claims. In *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), a state law prohibited a property owner from developing its property in any way that would prevent deer from accessing it. *Id.* at 92. The owners alleged that the law "deprive[d] Southview of its right to exclude the deer from its property, which amounts to a physical occupation of the property." *Id.* After a lengthy explanation of the so-called "permanency aspect" of a physical takings claim, the court allowed the case to go forward only because it concluded that the complaint "satisfied the permanency aspect." *Id.* at 94; *see also Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 98 (2d Cir. 2009) ("Our own test for whether a regulation constitutes a permanent physical occupation … looks to (1) the permanency of the invasion….").

In sum, to say there has "been some confusion over the use of the terms 'temporary' and 'permanent' in the takings context," *Otay Mesa*, 670 F.3d at 1363, is a considerable understatement. Lower courts are squarely and intractably divided over whether a physical occupation of finite (or even *potentially* finite) duration qualifies as a *per se* taking. While the majority of courts correctly recognize that the duration of a physical taking goes to the compensation due, but does not obviate the duty to compensate, a growing minority treats anything except a permanent physical invasion as a regulatory taking. The split is deep, entrenched, and intolerable. The Federal Circuit hears the vast majority of takings claims against the federal government, and there is no coherent basis for subjecting federal and state (and

local) governments to different takings tests. This Court should grant review to resolve the division among the lower courts and make clear that a physical taking is *per se* compensable, no matter its duration.

B. The Permanency Rule Embraced By the Decision Below Is Wrong.

1. This Court's cases make crystal clear that any difference between "permanent" and "temporary" physical invasions goes only to the amount of compensation that is just, not the duty to compensate. In either scenario, the same categorical rule applies: "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, … even though that use is temporary." *Tahoe-Sierra*, 535 U.S. at 322. Because physical invasions "are relatively rare, easily identified, and usually represent a greater affront to individual property rights" than land-use restrictions, *id.* at 324, this Court has treated *all* direct and substantial invasions of private property as *per se* takings requiring compensation, even if the invasion is temporary.

Indeed, many of this Court's seminal takings cases involve a type of physical taking that is, by its nature, "temporary"—namely, physical appropriation of property during a war. This Court considered several cases, for instance, in which the government seized factories to ensure production during the Second World War. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945). When the war ended and the government returned the factories to their owners,

the Court did not apply balancing tests or examine how much the seizure interfered with investment-backed expectations. The factory owners were categorically entitled to compensation for the time their property was invaded, and the limited duration of the taking was relevant only to the amount of compensation due. *See Gen. Motors*, 323 U.S. at 382-83.

2. The confusion over whether a taking must be "permanent" stems principally from this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426. But in context, it is clear that what animated the *Loretto* decision was not the duration of the taking but its physical character, and the "special kind of injury" a property owner suffers "when a stranger directly invades and occupies the owner's property." *Id.* at 436 (emphasis omitted). As the Federal Circuit thus has correctly recognized, in this context, "'permanent' does not mean forever, or anything like it." *Hendler*, 952 F.2d at 1376. It just means that there has been a physical *occupation* of the property, as distinguished from an interference with how the owner may use it.

Indeed, a true "permanency" requirement would be inconsistent with *Loretto* itself, as the physical occupation there was by no means "permanent" in the temporal sense. As the Court recognized, the landlord could have forced the removal of the cable box "by ceasing to rent the building to tenants." *Loretto*, 458 U.S. at 439 n.17. She also could have removed the

cable box if the cable company went out of business or the technology became obsolete. *See id.* at 448 (Blackmun, J., dissenting) ("[The state law] does not require appellant to permit the cable installation forever, but only '[s]o long as the property remains residential and a CATV company wishes to retain the installation.'"). None of those contingencies prevented this Court from treating the physical invasion as a *per se* taking.

Moreover, several cases on which *Loretto* relied to justify its *per se* rule involved takings that were limited in duration. For example, *Loretto* pointed to two more wartime cases that, like the factory seizures, involved short-term physical invasions. *See* 458 U.S. at 430-31 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), and *United States v. Causby*, 328 U.S. 256 (1946)). The coal mine in *Pewee* was seized only to ensure wartime coal production, while the overflights in *Causby* were authorized only until "six months after the end of the national emergency." 328 U.S. at 258-59. Even though neither case involved a taking that was "permanent" in the temporal sense, *Loretto* relied on both as examples of *per se* takings. The historical sources on which *Loretto* relied likewise rejected any constitutional distinction between "permanent" and "temporary" physical invasions. *See, e.g.*, 1 P. Nichols, *Law of Eminent Domain* 309-10 (2d ed. 1917) ("land or other property cannot be actually put to use by public authority for a temporary purpose without compensating the owner"); J. Lewis, *Law of Eminent Domain in the United States* 197 (1888) ("Any invasion of property, … whether temporary or permanent, is a taking."). As those sources all make clear, "the 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*, 670 F.3d at 1363.

To the extent *Loretto*'s use of the word "permanent" does any work at all, what it means is that some governmental invasions are so transient and inconsequential that they do not meaningfully constitute "occupation" or deprive the property owner of the use and enjoyment of his property. *Hendler*, 952 F.2d at 1377. The Federal Circuit has used the example of a government "truckdriver parking on someone's vacant land to eat lunch," *id.*, and has rejected a claim seeking compensation for "extremely limited and transient" invasions by government owl surveyors, *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1357 (Fed. Cir. 2002). This Court similarly has upheld an NLRA provision requiring business owners to allow momentary entries by union organizers, *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972), and has dismissed any takings concerns with the invasion by "firemen upon burning premises," *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 93 (1969).

But there is a fundamental difference between recognizing a *de minimis* exception for truly fleeting and limited-purpose intrusions and deeming a complete denial of the right to exclude the public something less than a *per se* taking because it is not foreordained that it will be permanent. Here, of course, there is nothing fleeting or *de minimis* about the taking. Petitioner is currently subject to an injunction that compels it to keep its private property open to the public unless it obtains a government

permit allowing it to exclude. Unless and until petitioner gets the state's say-so, it must allow members of the public to use its private property. That is a textbook physical taking that demands compensation, no matter how long it lasts.

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

The court below correctly recognized that petitioner's property has been physically taken by virtue of the trial court's injunction compelling a public-access easement unless and until petitioner obtains a permit. Accordingly, a holding that physical takings demand compensation even if they are not permanent would suffice to require vacatur of the injunction, which itself constitutes an uncompensated taking. After all, whether it acts "by statute" or "by judicial decree," "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702 (2010).

That said, this Court's grant of certiorari should extend to reviewing the constitutionality of the underlying source of that injunction—namely, the California Coastal Act's command that a private property owner may not take *any* action that would impact the "intensity" of the public's use of or access to the ocean without first obtaining a permit. As applied to prevent property owners from reducing the intensity of use and access by excluding the public from their private property, or even changing the

hours, days, or prices on which they allow the public onto their property, the permitting obligation itself constitutes an out-and-out physical taking, as it demands—on threat of onerous and coercive civil fines—a public-access easement over private property without just compensation. As a general matter, California is free to impose the Orwellian obligation to obtain a development permit to reduce the extent of coastal development. But when California demands a permit before a private property owner may exercise the fundamental rights to close or alter the terms of a business and exclude the public from private property, it crosses a constitutional line. And when the state demands a permit before painting over a private sign informing the public of their right to trespass, yet another constitutional line is crossed.

The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto*, 458 U.S. at 433. It is what makes private property private. For that reason, the government violates the Takings Clause not only when it confiscates private property, but also when it mandates a public easement over private land, thereby depriving the owner of his right to exclude. That proposition, by now well-settled, was established in *Nollan*, another case involving the California Coastal Commission's efforts to coerce a private property owner to open its property to the public without compensation.

In *Nollan*, the Commission granted the Nollans a permit to build a house on their beachfront property, "subject to the condition that they allow the public an easement to pass across a portion of their property."

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987). The question was whether that coercive condition violated the Takings Clause. In the course of answering that question, this Court made clear that a *per se* taking would "obvious[ly]" result if a state simply declared a public-access easement: "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831.

This Court reaffirmed that principle in *Dolan*, when it again addressed an allegedly unconstitutional coercive permitting condition, and again began from the premise that declaring a public-access easement by *ipse dixit* would be *per se* unconstitutional: "Without question, had the city simply required petitioner to dedicate a strip of land … for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). Likewise, in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), this Court again confirmed that "if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." *Id.* at 2598-99.

The Coastal Act seizes an easement over Martins Beach in exactly the manner that *Nollan*, *Dolan*, and *Koontz* considered a *per se* taking. The Act requires

any person "wishing to perform or undertake any development in the coastal zone ... [to] obtain a coastal development permit." Cal. Pub. Res. Code §30600. The Act defines "development" as any "change in the intensity of use of water, or of access thereto." Cal. Pub. Res. Code §30106. By counter-intuitively interpreting a *reduction* in the intensity of use occasioned by exercising a previously unexercised right to exclude as "development," the decision below interprets the Coastal Act to simply demand a public easement (not to mention continued operation of a business at a loss and compelled speech) unless and until petitioner can obtain a permit. Thus, the hypothetical *per se* taking this Court posited in *Nollan*, *Dolan*, and *Koontz* describes this case to a tee: California has "simply required [petitioner] to make an easement across [its] beachfront available to the public." *Nollan*, 483 U.S. at 831. Under *Nollan*, *Dolan*, and *Koontz*, that is a *per se* physical taking.

The lower court nonetheless dismissed petitioner's takings challenge to the Coastal Act on "ripeness" grounds. But the court did not deem the challenge unripe because there was some unexhausted mechanism for obtaining compensation for the compelled easement, however long it lasted. To the contrary, neither the Coastal Commission nor the County has ever suggested that it would compensate petitioner for the public easement, and there is no mechanism for either to do so. Instead, the court found the takings claim "unripe" simply because it speculated that a permit might one day be granted. In other words, the court deemed petitioner's challenge to the Coastal Act (as opposed to the injunction)

"unripe" because it was "temporary"—or, more accurately, indefinite but not obviously permanent.

That just repeats the same error the court committed with respect to the injunction, this time under the rubric of "ripeness." But the court's reasoning is, if anything, even less defensible as a ripeness holding. If the government physically occupied petitioner's property, but provided an avenue through which petitioner could repossess the property, the latter avenue would not make the current physical taking unripe. Put differently, the possibility of abating an ongoing taking does not make the ongoing taking any less ripe for legal redress—especially when the government has no ready mechanism for compensating the ongoing taking as long as it lasts. In short, neither ripeness doctrine nor the possibility of a permit saves the Coastal Act from imposing a naked, ongoing public-access easement.

But the constitutional problems with California's novel conflation of the exercise of basic constitutional rights with "development" necessitating a permit do not end there. The lynchpin of California's decision to force petitioner to give the public access to its property is the fact that the prior owner (and petitioner briefly) offered the public access in exchange for a fee as part of a commercial enterprise. Based on that foothold, the government not only converted privately negotiated access into government-compelled access, but also required petitioner to grant the public access at times, days, and prices of the government's choosing—terms that generate ongoing losses—unless petitioner obtains a permit to change those terms. Indeed, petitioner must continue operating the beach

on exactly the same terms and at exactly the same prices (unadjusted for inflation) as when its predecessors operated the business *in 1973*. Petitioner cannot reduce its days or hours of operation and cannot increase the price of admission from a paltry $2 (35 cents in 1973 dollars) without the Commission's say-so, because those actions would (according to the Commission) change the "intensity" of access to the water and are therefore "development" requiring a permit.

The Coastal Act, as interpreted below, thus stacks multiple violations atop the core Takings Clause problem. By prohibiting petitioner from closing its business without first obtaining a permit, the Act contravenes petitioner's "absolute right to terminate his entire business for any reason he pleases." *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965). And by prohibiting petitioner from raising the entry fee from that which prevailed in *1973* even to account for inflation, the Act violates constitutional prohibitions on confiscatory government-imposed rates. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). Accordingly, while the imposition of an uncompensated public-access easement is a taking in and of itself, the Coastal Act as applied here actually imposes two takings—first, by physically invading the property, and second, by prohibiting petitioner from recouping the substantial costs of opening the property to the public. If the Coastal Act requires a permit to shut down a business or operate that business profitably, then the Coastal Act is unconstitutional.

Indeed, this Court in *Nollan*, *Dolan*, and *Koontz* considered the possibility of the government outright demanding a public-access easement rather than requiring it as a condition of some sought-after development permit. This Court had no difficulty labeling that possibility a *per se* taking. But this Court could not even conceive that the government would not only demand that a private property owner provide the public with an easement, but also force the property owner to furnish parking and soft drinks to the public at a loss. Yet that is what things have come to in California circa 2018.

But, wait, there is still more. The Coastal Act as interpreted below not only compels public access (with parking at 1973 rates) to private property, but even manages to compel speech. According to the California courts, petitioner engaged in unpermitted "development" by painting over a preexisting sign that advertised public access to the property, because changing how it *advertises* access might decrease "the intensity of use of water, or of access thereto." Cal. Pub. Res. Code §30106. But for the First Amendment, the facial absurdity of that definition of "development" would be Californians' problem. The First Amendment, however, makes compelled advertising of the opportunity to trespass for a pittance a constitutional problem. "[C]ompelling cognizable speech … is just as suspect as suppressing it, and typically subject to the same level of scrutiny." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 480-81 (1997); *see also, e.g.*, *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781 (1988). Whatever power the state may have to compel speech (or its subsidization) from willing participants in a state-

regulated industry, the state does not have the power to compel someone to affirmatively advertise a public-access easement that he is not even willingly providing in the first place at bargain-basement prices.

In short, the government cannot condition a property owner's right to exclude on the permission of a government agency. Nor can it require a property owner to get the government's say-so before it may cease advertising the opportunity to trespass, park at 1973 rates, and enjoy a day on what all agree is at least nominally private property. By purporting to do all that and more, the Coastal Act is unconstitutional several times over.

III. The Questions Presented Are Exceptionally Important.

The decision below renders the California Coastal Act an extreme outlier that runs roughshod over all manner of constitutional rights. By the lower court's telling, private property owners can be compelled to invite the public onto their private property, to provide parking and soft drinks at Whip-Inflation-Now prices, and to advertise this extraordinary opportunity to the very public the property owner would like to exclude. The decision below thus interpreted the Act to impose at least two distinct unconstitutional takings, and to violate the Due Process Clause and the First Amendment to boot.

Left standing, that decision will throw private property rights in California into disarray. After all, petitioner is hardly the only private property owner along the vast California coast, or the only one who would prefer to exclude the public from its private

property. And petitioner will hardly be the last coastal property owner who wishes to cease operating a business or to change its prices or hours of operation. Anywhere but California, this *reduction* in the intensity of public use of the oceanfront might be a welcome antidote to "development" as conventionally understood. But in California, exercising the fundamental property right to exclude, the equally fundamental right to shutter a money-losing business, and the First Amendment right to refrain from engaging in unwanted advertising all constitute "development" necessitating a permit. As a matter of California law, California is, of course, free to interpret "development" as counter-intuitively as it pleases. But it is not free to interpret the term to run roughshod over petitioner's federal constitutional rights.

Put simply, the Coastal Act as interpreted below is not remotely consistent with the Constitution's command that the state may not take private property without paying just compensation. It is therefore imperative that this Court make definitively clear that states may not outright compel the very easements that the Court held they could not coerce in *Nollan* and *Dolan*, and that they may not avoid their obligation to pay just compensation by holding out the mere prospect that a physical taking may someday abate. This is an ideal case in which to reaffirm those bedrock propositions, as the decision below ultimately rests entirely on the court's erroneous holding that, "for a physical invasion to be considered a *per se* taking, it must be permanent." App.50. Once that fatal flaw is corrected, it is clear not only that the court-mandated easement cannot survive, but that the

Coastal Act cannot constitutionally be applied in the manner it has been applied here.

Accordingly, the Court should grant certiorari to resolve the deep, entrenched, and intolerable split over whether a physical taking must be "permanent" to be a *per se* taking. The rules for takings in California should not be different from those in the rest of the country. *A fortiori*, the rules for takings by the federal and state government within California should be the same. And California's bizarre effort to condition the rights to exclude, shutter a business, and avoid compelled speech on obtaining a permit from the Coastal Commission should be invalidated before it takes root.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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